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REPORTS.

OF

515

CASES ARGUED AND ~~DETERMINED~~

IN THE

SUPREME COURT OF ALABAMA,

DURING

DECEMBER TERMS, 1885-86.

BY

E. P. MORRISSETT,

SPECIAL REPORTER.

VOL. LXXX.

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OFFICERS OF THE COURT
DURING THE TIME OF THESE DECISIONS.

GEORGE W. STONE, CHIEF JUSTICE, Montgomery.

H. M. SOMERVILLE, ASSOCIATE JUSTICE, Tuskaloosa.

DAVID CLOPTON, ASSOCIATE JUSTICE, Montgomery.

THOS. N. McCLELLAN, ATTORNEY-GENERAL, Athens.

JOHN W. A. SANFORD, CLERK, Montgomery.

JUNIUS M. RIGGS, MARSHAL, Montgomery.

STERLING A. WOOD, PRIVATE SECRETARY, Tuskaloosa.

ERRATA.

In *Beck v. State*, p. 3, 19th line from top, for "accepted to," read *excepted* to.

In *Powell v. Powell*, p. 14, 14th line from top, for "reviewed," read *viewed*.

In *Steiner & Bro. v. Snow*, p. 46, 3d line from bottom, for "one proof," read *due* proof; and in same case, p. 47, 16th line from top, for "we did not," read *he* did not.

In *Allen v. Allen*, p. 156, 16th line from bottom, for "truism," read *provision*; and for "assimilate," read *assimilate*.

In *McDowell v. Brantley*, p. 176, 20th line from top, for "has constituted," read *constituted*.

In *Allen v. Allen*, p. 183, 16th line from top, for "affirmed," read *confirmed*.

In *Crowder v. Fletcher & Co.*, p. 222, 13th line from bottom, for "public power," read *feeble* power.

In *Reynolds v. Caldwell*, p. 232, the name of H. C. TOMPKINS should appear, as of counsel for appellee.

In *Modawell v. Hudson*, p. 268, 7th line from top, for "precedent," read *predicate*.

In *Western Union Tel. Co. v. State Board of Assessment*, p. 273, Hon. THOS. N. McCLELLAN, Attorney-General, appeared for the appellee, and filed a printed argument, which did not come into the hands of the Reporter with the record.

In *Smith v. Inge*, p. 283, first head-note, instead of "unofficial," read *official*.

In *Wright v. Graves*, p. 419, *Crim v. Neems*, as cited in the 16th line from top, should be *Crim v. Nelms*, reported in 78 Ala. 604.

In *Haas v. Taylor*, p. 465, 8th line from bottom, for "one hundred bushels," read *one bushel*.

In *McDevitt v. Lambert*, p. 539, 9th line from top, for "all objections," read *all other* objections.

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CASES

IN THE

SUPREME COURT OF ALABAMA,

DECEMBER TERM, 1885.

Beck v. The State.

Indictment for Carrying Concealed Pistol.

1. *Attempted fraud in procuring testimony ; when properly considered to disadvantage of party attempting same.*—If a party attempts to practice a fraud on the court, by procuring or assisting to procure testimony which he knows to be false, or resorting to any other artifice designed to deceive or mislead, this is a circumstance which the jury may properly consider to his disadvantage ; but, to justify a charge invoking this principle, there must be something more than a mere contradiction between the defendant's own testimony and the testimony of the witnesses against him.

2. *Abstract charge ; when reversal worked by.*—An abstract charge, even though it assert a correct legal proposition, will work a reversal, when it may have misled the jury.

APPEAL from Bibb Circuit Court.

Tried before Hon. JAS. E. COBB.

The defendant, Willis Beck, was tried and convicted under a plea of not guilty at the Spring Term of said court, 1886, of the offense of carrying a concealed pistol. As shown by the bill of exceptions, a witness introduced by the State testified, in substance, that on a certain day, within twelve months before the finding of the indictment, he saw the defendant at Briarfield, in said county, with a pistol, which he carried in his hip-pocket, exposed to public view ; that on meeting the defendant later in the day the weapon was no longer visible, but witness saw the "impression," or outline, of a pistol on the same pocket in which he had previously carried it ; that witness did not know what it was, "it might have been a piece of wood or something else in that shape," but it had "the shape and appearance of a pistol, with handle, cylinder and barrel." To this, and corroborative testimony to the same effect, the de-

[Beck v. The State.]

fendant objected, and duly excepted to the adverse ruling of the court.

The defendant introduced evidence tending to show that, while engaged in playing a game of ball, a short while prior to the time covered by the foregoing testimony, "he dropped a large wooden pipe and picked it up and put it in the hip-pocket" referred to; "that said pipe was a large wood pipe, and had a large stem which was crooked." There were, as shown by the bill of exceptions, "two witnesses for the defendant, who swore that the defendant dropped his pipe while playing ball and put it in his hip-pocket, and one witness swore he had it in his side-pocket and that he picked it up at another place. The defendant himself swore that he had no pistol about his person on that day." The material portion of the charge given to the jury, and excepted to by the defendant, is set out in the opinion.

No assignment of error appears upon the record.

THOS. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J.—There is a principle of law, that if a fraud on the court be attempted, in the getting up of false testimony, or by any other artifice tending, or designed to deceive or mislead, or to make the false appear to be the true, and this is knowingly assisted, or procured to be done by the suitor, this is a circumstance which the jury may rightly consider, to the disadvantage of the party making, or assisting in such attempt. An honest cause, the law considers, needs not the aid of such reprehensible methods. But, to justify the application of this principle, there must be some proof of it, or testimony of facts or circumstances, tending to support such inference. Mere conflict among witnesses examined on the opposing side, without more, does not and can not raise such inquiry, or bring the principle referred to into play. 1 Greenl. Ev., § 469; *Childs v. The State*, 76 Ala. 93. Cases of conflicting statement, or conflicting recollection, frequently occur, and it would be a dangerous precedent, as well as an unsound rule, to visit on either side, in case of such conflict, the severe intendments which the law denounces against the suborner, or procurer of simulated or manufactured testimony.

There was in this case a direct conflict in testimony. One witness testified that on the day on which the alleged offense was committed, he saw a pistol projecting out of defendant's hip-pocket. He and other witnesses gave testimony tending to show that later on that day, a pistol was in said pocket and on the person of the defendant, and that it was concealed from view. The defendant testified in his own behalf that he had

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no pistol on that day. This conflict presented a question for the jury to determine. They were not bound to believe the one side or the other, further than to render a verdict under the charge of the court, "their judgments should be convinced, with that measure of conviction the law requires in criminal cases." The bill of exceptions sets forth that it contains all the evidence, and the conflict noted above, and a conflict on one other question of fact, are the only incidents of the trial on which the charge hereafter noted can be attempted to be justified. They do not present a state of facts which raised the legal question embodied in that charge, and the charge was consequently abstract. An abstract charge, if it probably misled the jury, even if it assert a correct legal principle, is an error for which we will reverse. *Partridge v. Forsyth*, 29 Ala. 200; *Russell v. Erwin*, 38 Ala. 44; *McWilliams v. Rogers*, 56 Ala. 87; *Glass v. Pinckard*, *Id.* 592; *Hammett v. Brown*, 60 Ala. 498; *Bernstein v. Humes*, 71 Ala. 260; *Herring v. Skaggs*, 73 Ala. 446. The charge we refer to is the third paragraph of the general charge given and accepted to, and instructed them "if they believed from the evidence that defendant had attempted to prove facts material to his defense by false statements, and that he knew such statements to be false, and, so knowing, procured them to be made, then, that might be a circumstance against the defendant to be considered by the jury in weighing the evidence."

As we said above, the evidence on the trial did not raise the legal question which the charge sets forth, and the charge was abstract. It moreover authorized the jury to draw an inference, while there was no testimony from which it could be drawn. "A charge that the jury may infer a fact of which there is no evidence is erroneous." *Henderson v. The State*, 49 Ala. 20; *Everett v. U. S.*, 6 Por. 166; *Lehman, Durr & Co. v. Warren*, 53 Ala. 535.

It is not our intention to intimate an opinion as to the guilt or innocence of the accused. That is a question for the jury, which, weighing the evidence, they must determine for themselves.

There is nothing in the other questions reserved.

Reversed and remanded.

Evans v. The State.

Indictment for Robbery.

1. *Trial by impartial jury.*—The purpose of the statutory provisions for drawing, summoning and empanelling jurors for the trial of persons indicted for capital felonies, is to secure a trial by an impartial jury.

2. *From whom jury is to be selected.*—It is the right of the defendant to have a jury selected from all the persons summoned as special and regular jurors who are in attendance and competent, only subject to any contingency and necessity that may arise from the operation of the statutory provisions, but where the same persons are drawn and summoned for the trial of two defendants indicted for separate capital felonies, to be tried on the same day, should one or more of them be engaged in the consideration of the case of one of the accused, while a jury is being selected for the trial of the other, the necessity in such case is created by the act of the court, and is in violation of the requirements of § 4874 of the Code.

3. *Robbery; what constitutes.*—Snatching a thing from the hands of another, accompanied with violence, or threats creating apprehensions of bodily harm, or resistance however slight, constitutes robbery.

APPEAL from the City Court of Selma.

Tried before HON. JNO. HARALSON.

The defendant was indicted and tried for robbery. At the time of the trial, the defendant, being arraigned, pleaded not guilty, and the court proceeded to draw a special jury as required by the jury law of Dallas county. At the same time there was another defendant present, charged with murder, whose trial was set for the same day, and for whose trial a special jury was also to be drawn. The presiding judge ordered the clerk to keep two separate lists, one for each case, and as he would draw out of the box a name, caused it to be put down on each of said lists, and thus continued to draw until the list contained the full number of names requisite to make out the *venire*, thereby making one drawing answer for each of said cases. With the jury thus organized against the objection and exception of defendant, the defendant was placed on trial and convicted.

Maggie Thomas, whom it was charged the accused had robbed, testified that on the 3rd of December, 1884, the accused followed her into Donner's yard in the city of Selma, and snatched from her hand a satchel containing three quarter-of-dollar pieces, in silver money; that he got the satchel from her and she never recovered it; that in getting the satchel he jerked her with such force as to throw her down. Witness further

[Evans v. The State.]

testified to the appearance of the accused at the time of the commission of the offense, and described him with his hat drawn down over his face, &c. The solicitor, at this point, put the hat, shown to witness, on defendant's head, drawn down over his face as described by the witness. The defendant's counsel objected to this mode of examination, and "*excepted to its going to the jury.*" The defendant requested the court to charge the jury: 3. "That if they believe from the evidence that the bag was snatched from the hand of the party charged to be assaulted, then they must believe there was evidence of violence, otherwise than snatching the bag from her hand, or they must find the defendant not guilty." 9. "That if they believe from the evidence that the only object of the person who snatched the bag out of the hand of the assaulted person was to steal the bag and contents, without violence, then they must find the defendant not guilty of robbery," which charges the court refused, and defendant excepted. A number of other charges embodying substantially the same instructions were asked by defendant and refused, to which refusal defendant reserved exception—and assigns the same, with other adverse rulings of the courts excepted to, as error.

BROOKS & ROY, for appellant, cited *Posey v. The State*, 73 Ala., 492; *Shelton v. The State*, *Ib.*, 9; *Spicer v. The State*, 69 Ala., 159; *Paris v. The State*, 36 Ala., 232; *Rush v. The State*, 61 Ala., 90.

T. N. McCLELLAN, Attorney-General, for the State.

CLOPTON, J.—Founded on the gravity of the crime charged, and on the serious consequences to the accused that result from a conviction, special statutory provisions are made for drawing, summoning and empaneling jurors for the trial of a person indicted for a felony, that may be punished capitally. The purpose of such enactments is to secure a trial by an impartial jury; and they manifest an intention to guard the rights of the accused, and to afford protection so far as the proper administration of the criminal law will justify. In furtherance of this humane purpose, section 4874 of the Code provides, that in such case, the court must make an order, commanding the sheriff to summon not less than fifty, nor more than one hundred persons, including those summoned on the regular juries for the week or term, when the term does not exceed one week. Under this statute, the sheriff exercised a discretion as to the persons, other than the regular jurors, whom he would summon.

By the special act "to regulate the drawing and empaneling of grand and petit jurors in Dallas county," this discretion is

[Evans v. The State.]

taken from the sheriff. The act provides, that the court must make the order required by section 4874, and shall then, in open court, cause to be drawn from the jury box the number of names required, and cause a list of the jurors thus drawn, and of the regular jurors for the week, to be forthwith served on the defendant. On the day set for trial, the court is required to enquire into and pass upon the qualifications of the persons summoned who appear, and cause the names of those held competent to be placed on lists, from which the defendant strikes two names and the solicitor strikes one, and so continue, until only twelve names remain, who constitute the jury. The manifest operation of these provisions is, to create and preserve the entirety and unity of the proceedings in empanelling a jury, from the making of the order, to the actual selection of the jury. The statute contemplates, that it shall be a proceeding in the particular case, individualized and separate from all other criminal cases pending in the court.

The constitution guarantees to the defendant a trial by an impartial jury. The legislature provides the modes, by which this right shall be secured and enjoyed. By the statute under consideration, a jury must be selected from the lists caused to be prepared after the court has inquired into and passed on the qualifications of the persons summoned and present. When only twelve names remain, the right to strike or challenge ceases. Under the statutory regulations, it is the right of the defendant to have a jury selected from all the persons summoned as special and regular jurors, who are in attendance and competent, only subject to any contingency and necessity, that may arise from the operation of the statutory provisions. For instance: In *Kimbrough v. State*, 62 Ala. 248, it was held, that the court need not delay empanelling a jury, when one or more of the regular jurors are on the *venire* served on the defendant, are engaged in the consideration of another case, and can not come into court voluntarily, nor be brought in without disregarding the rights of some other persons, equally entitled to the consideration of the law. The ruling is founded on the presumption, that when the legislature provided, that the regular jurors in attendance should constitute a part of the *venire*, it was contemplated that some of them might be engaged in the trial of another cause, and that the right of the defendant to have such regular jurors called is subject to the due administration of the law, and does not operate to delay or obstruct the business of the court. But where the trials of two persons, indicted for separate capital felonies, are set on the same day, and the same persons are drawn and summoned as special jurors for both trials, should one or more of them be engaged in the consideration of the case of one of the accused,

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while a jury is being selected for the trial of the other, the court would be unable to comply with the statutory requirement to "cause the names of all those whom the court may hold to be competent jurors" to be placed on the lists, from which the defendant and the solicitor must strike. The necessity in such case does not arise from the operation of the statute, but is created by the act of the court—by the manner in which the special jurors are drawn.

The order of the court for summoning jurors, drawing the number of names required as special jurors, the service of the *venire* on the defendant, enquiring into and passing on the qualifications of the persons summoned, and causing the lists of those competent to be prepared, are all preliminary and necessary proceedings to a legal trial. If a trial is had, its inception, in legal contemplation, is in the order made as required by section 4874 of the Code. Such order can not be made jointly for the trials of two defendants, charged with distinct felonies; and separate orders can not be followed by a joint drawing from the jury box of the requisite number of names as special jurors. The requirements are, the court must make such order, "and shall then, in open court, cause to be drawn from said jury box the number of names required." The statute contemplates and provides for a separate drawing, as well as a separate order. The intention of the statute is to provide for the trial of one defendant, or of two or more defendants jointly indicted—of one case—and preserves the singleness and continuity of the antecedent proceedings. At no stage, should they be complicated or connected with the proceedings in any other case. A joint drawing of the names of persons to serve as special jurors for the trial of two persons separately indicted is, to that extent and for that purpose, a consolidation of the two cases. The provisions of the statute are mandatory, and must be obeyed as expressed. Error is clearly shown, and it does not affirmatively appear there is no injury. The defendant has not been tried by a jury drawn as required by the statute, and this is a reversible error.

While it may be true, that mere taking unawares, or a sudden snatching a thing from the hand of another is not robbery, if the snatching be accompanied with violence, or such demonstrations or threats as to create a reasonable apprehension of bodily injury, or creates resistance however slight, the offense is committed. The evidence of the witness from whom the satchel was taken, if believed, shows that violence was used. All the instructions requested by the defendant have a tendency to divert the attention of the jury, or to withdraw from their consideration the evidence of material facts. Being misleading, they were properly refused.—*Jackson v. State*, 69 Ala. 249.

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Conceding that the use of the defendant's person, and that by the solicitor, in the presence of the jury, as an illustration, is improper, the record does not show that the court made, or was asked to make any ruling on the objection. The exception is to the act of the solicitor, and not to any decision of the court. The question is not properly reserved for review.

The question, as to the order for the service of the *venire*, and its service on the defendant will probably not arise on another trial.

Reversed and remanded.

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Indictment for Cruelty to Animals.

1. *Jurisdiction of justice of the peace under statute against cruelty to animals.*—Justices of the peace have not final jurisdiction of offenses committed in violation of the statute against "cruelty to animals," (approved, February 23, 1883,—Sess. Acts 187—amended, February 17, 1885,—Sess. Acts 156,) there being nothing in either statute which confers such jurisdiction.

APPEAL from the Circuit Court of Perry.

Tried before the Hon. JOHN MOORE.

The appellant in this case, Sam Horton, was indicted at the fall term of said court, 1885, for the offense of cruelty to animals. On the trial, under a plea of former jeopardy interposed by the defendant, it was shown that the alleged offense had been previously investigated by a justice of the peace who bound the defendant over to the Circuit Court, his judgment entry being as follows: "Found guilty and gives bond for appearance at court." The issue of former conviction was decided adversely to appellant, who, thereupon, went to trial under a plea of not guilty, and was convicted.

J. W. BUSH, for appellant.

T. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J.—This proceeding was instituted under the statute, "To prevent cruelty to animals," approved February 23, 1883—Sess. Acts 187—amended February 17, 1885—Sess. Acts 156. There is nothing in either statute which declares that justices of the peace have jurisdiction for the final trial,

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while the maximum fine that may be imposed would rather repel the idea that such jurisdiction was intended to be conferred, even by the original enactment. This statute permits a fine of \$100 to be imposed, whereas \$50 is the limit of the justice's jurisdiction in cases of tort, and in actions for the recovery of specific property, (Code of 1876 § 757, subd. 2 and 4), and \$10, as the value of property involved, in certain petty criminal offenses of which he has jurisdiction.—Code, § 4628. The section last cited is the general statute which clothes the justices with jurisdiction of public offenses, and cruelty to animals is not one of the offenses named. These reasons tend strongly to convince us that by the statute as first enacted, it was not intended to confide its administration to justices of the peace.

The amendatory act, however, relieves this question of all semblance of doubt. It provides that, "for conviction under this act, the solicitor shall be entitled to a fee of fifteen dollars." It could not have been intended or expected that the solicitors would attend the sittings of the justices' courts.

The justice was without jurisdiction to finally try the defendant on the charge preferred against him. He exhausted his power when he heard the complainant on preliminary examination, and bound the defendant to appear at court and answer to the charge. If he pronounced him guilty, it must be interpreted as the expression of his opinion that the evidence was sufficiently strong to authorize the sending of the case to the grand jury. This he was authorized to do, and his jurisdiction extended no farther.

Under the foregoing principles, there was nothing in the plea of former jeopardy which the defendant interposed. It might have been stricken from the file without error, and any ruling by which it was gotten rid of could do the defendant no injury.

Affirmed.

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Indictment for Selling Intoxicating Liquors.

1. *Finding of the court upon testimony, not reviewed on appeal.*—In a prosecution for a misdemeanor, before the County Court, the case being submitted to the decision of the court without the intervention of a jury, its finding on the facts can not be reviewed, or revised, by this court, on appeal.

2. *Whether liquor sold, was intoxicating, may be shown by its effects on those using it.*—In a prosecution for selling intoxicating liquor, in viola-

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tion of a local prohibitory law, a witness for the prosecution having testified, that the liquor, or beverage sold by the defendant, produced on him effects similar to those produced by whisky, it is competent for the defendant to prove by other witnesses who had drunk it, that it had no intoxicating effect on them.

APPEAL from Wilcox County Court.

Tried before HON. JOHN PURIFOY.

Mat Knowles was indicted, and tried in the Wilcox County Court, for selling intoxicating liquors in violation of a local statute. The case was tried by the court, on the plea of "not guilty," the defendant was found guilty, and a fine of one thousand dollars adjudged against him. One of the witnesses for the State testified that he had bought of the defendant three bottles containing fruit, with liquid around the fruit; that he and another had eaten of the fruit, and drunk the liquid that was in the bottles; that the effect of this eating and drinking upon witness was like the effect of drinking whisky; that he felt like he was intoxicated. After the State had closed, the defendant introduced a witness, Dock Griffith, who testified that he had many times bought of the defendant the same kind of fruit and liquid in bottles, described by the witnesses for the State, and had eaten the fruit and drunk the liquid without feeling any intoxicating effect, or any such effect as he experienced from drinking whisky. The solicitor moved to exclude this testimony of defendant, on the ground that it was irrelevant; and, the same was excluded by the court. The defendant introduced a number of other witnesses, who testified, substantially, as the witness Griffith, that they had purchased of the defendant fruit and liquid, such as was testified about by the witnesses for the State, had eaten the fruit and drunk the liquid, without feeling any intoxicating effects. Their testimony was also, upon motion of the solicitor, excluded by the court. Defendant excepted to these several rulings of the court, and, on appeal, assigns the same as error.

T. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—Under the rule announced in *Bell v. The State*, 75 Ala. 25, this court has no jurisdiction and must therefore decline to review the finding of the County Court of Wilcox county upon the testimony set out in the record. See also *Calloway v. The State*, 75 Ala. 56; Acts, 1880-81, p. 295.

The indictment is for selling intoxicating liquor in violation of a prohibitory liquor law, approved December 12, 1882, and made applicable to the county of Wilcox.—Acts 1882-83, pp. 254-255.

The court, in our judgment, erred in excluding the state-
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ments of the several witnesses, who testified as to the effect upon themselves of the beverage for the sale of which the State had elected to prosecute the defendant. The question for decision was the intoxicating quality of this fluid or beverage, which contained cherries, and was sold in bottles by the defendant. A witness for the State had testified that its effect upon himself and another person had been similar to that ordinarily produced by whisky. It was competent to show by others that its effect on them, when drank in appreciable quantities, was not intoxicating. The most available mode of testing the nature and properties of a fluid or drug, next to that of chemical analysis, is by its effects on the human system. That a liquor when taken in certain quantities intoxicated or failed to intoxicate the person taking it, is as competent to prove or disprove its intoxicating qualities, as it would be to prove the poisonous nature of a drug by the effect following its administration. Negative testimony of this kind may often be very weak and inconclusive, because of the comparison involved in determining the relative facility with which different persons may or may not become intoxicated or drunk. But we can not say what would have been the effect of this evidence upon the mind of the judge, who was substituted for the jury as the trier of the facts of the cause. We decide nothing more than the admissibility of this evidence, leaving to the County Court itself to decide what shall be its weight or credibility.

The judgment is reversed and the cause remanded.

Powell et al. v. Powell.

Bill in Equity, by Heir against Administrator, to remove Settlement of Estate from the Probate to the Chancery Court, for Final Settlement, and Account.

1. *An administrator purchasing a decree against his estate,—when enures to the benefit of estate; when entitled to credit.*—If an administrator purchase a decree which is a debt or charge against the estate, at less than the amount due on it, the benefit of the purchase enures to the estate, but he is entitled to be reimbursed the amount of his private funds used in making the purchase.

2. *When heirs have a right to claim the benefit of a purchase of the estate lands by the administrator.*—The decree having been rendered under a bill foreclosing a vendor's lien on land, and the administrator becoming the purchaser of the land at the sale under the decree, prior to his purchase of the decree; the right of the heirs to claim the benefit of the

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latter purchase, as being made for the estate, is independent of their right of election to claim the benefit of the former

3. *When heirs may elect to claim profit arising from resale—when administrator entitled to be repaid.*—The land having been resold by the administrator at a profit, the heirs may, at their election, claim the profit arising from the resale; but, if they so elect, the administrator is entitled to be repaid the purchase-money expended by him, and also to the rents and profits accruing up to the resale.

4. *Election must be in unambiguous terms.*—Such election, to be effective, must be clearly manifested, and declared in unambiguous terms; and in a bill which seeks to bring the administrator to a settlement, if the heirs desire to claim the profits of the resale, they must distinctly aver their election, and the facts on which it is based, or assert their claim before the register, before entering on a statement of the account.

APPEAL from Lowndes Chancery Court.

Heard before the Hon. JOHN A. FOSTER

This was a bill filed by Claudius W. Powell, Jr., against George N. Powell, the administrator of the estate of orator's father, Claudius W. Powell, Sr., and the sureties on the administrator's bond, and was commenced on March 20th, 1883. The bill charges that a large amount of personal property and choses in action of the estate had passed into the hands of the defendant, Powell, for which he had not properly accounted, and that he had purchased the lands of the estate, sold under the order of the Probate Court, and had failed to account for the proceeds of the sale.

The prayer of complainant's bill is that the defendant, Powell, be compelled to make a final settlement of his administration of said estate; that the sureties on his bond be made parties defendant, and that the administration of the said Claudius W. Powell Sr's estate be removed into the Chancery Court for final settlement; that the administrator be held to account for all the property of the estate, and that the lands in his possession, formerly belonging to the estate, be subjected to the payment of any decree that might be rendered in favor of complainant.

The respondents file their plea in bar to the relief sought by the complainant, setting up a final settlement of said estate claimed to have been had by the administrator, in the Probate Court, on the 9th of February, 1874. This plea, upon hearing, was overruled, and respondent ordered to file his accounts within a stated time. It was further ordered by the court that after the filing of said accounts the register should fix a day to hear evidence and determine upon the matters of the account and report the result of his findings to the next succeeding term of the court. Upon the coming in of the register's report, the respondent, Powell, filed a number of exceptions, the nature of which, and the action of the court in reference thereto, sufficiently appear in the opinion of this court.

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STONE, C. J.—Claudius W. Powell, Jr., is the only child and heir at law of Claudius W. Powell, Sr., deceased, and George N. Powell became the administrator of the latter's estate. The present bill was filed by the heir and distributee, to bring the administrator to a settlement. Before the death of Claudius W., he purchased from Coster & Coxe a tract of land, and died owing the purchase-money. Under a bill filed for the purpose against the heir and administrator, Coster & Coxe obtained a decree, ascertaining the sum of the unpaid purchase-money to be thirty-one hundred and fifty-eight dollars, and ordering the land to be sold for its payment. The land was sold, and Geo. N. Powell became the purchaser at the price of three hundred and thirty dollars; the sale was confirmed, and deed made to him by the register. Geo. N. had the possession, use and occupation of the land, for about four years, and sold it for more than double what it cost him.

On the day succeeding the sale by the register, George N. Powell purchased the said decree of Coster & Coxe against Powell, from one Cantelou, and obtained a transfer of it, with all its rights and liens, to himself individually. How Cantelou became the owner of it, with the right to dispose of it, does not appear, except that Coster & Coxe had acquired their title or right to it from him. No question is raised, however, on Cantelou's right to control and dispose of the decree. Both parties base their claim on the fact and validity of his transfer. Powell purchased at greatly less than the face of the decree, paying for it with his own means, except the sum of about three hundred dollars, a debt due from Cantelou to the estate of Claudius W. Powell. One effect of the purchase of the decree by Geo. N. Powell was, that he obtained back the three hundred and thirty dollars he had given for the land at the register's sale, less the costs of the suit—something over eighty dollars.

In the decretal order of reference, the chancellor gave no instructions to the register; and the register, in stating the account, permitted the said Geo. N. to retain the rents and proceeds of sale of said land. In other words, he treated the land, its use or rents, and the proceeds of its sale, as the individual property of the said Geo. N. He allowed him a credit for all the money and means, his individual property, which he had used and expended in the purchase and liquidation of the decree, less the sum the land sale yielded in excess of the costs of the chancery suit. There were exceptions to the register's report, by complainant, among other matters, as follows:

"8. Complainant excepts to the register's allowance to the adm'r of \$762.94 on account of the Cantelou matter." This, we may state here, is the sum, with interest, expended by Geo. N. Powell of his own means, in the purchase of the decree from Cantelou.

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"9. Complainant excepts to the refusal to charge the adm'r with the rents of the lands of said estate for the years 1872, 1873, 1874 and 1875, and interest thereon; and the refusal of the register to charge the administrator with the amount of money received for said lands from Sanderson, Jan'y 3, 1876, and the interest thereon, growing out of said Cantelou matter, referred to in the last exception." The chancellor sustained the 8th exception, and struck out the credit of \$762.94, which the register had allowed the administrator. He overruled the 9th exception. Geo. N. Powell alone appeals, and the single error he complains of is the sustaining by the chancellor of the complainant's 8th exception.

It is very manifest that, in any aspect in which this case may be reviewed, the 8th exception ought to have been overruled. The sale of the land had left the whole balance of the decree—more than twenty-eight hundred dollars—a debt and charge against the estate of Claudius W. Powell. This debt Geo. N. Powell purchased and extinguished, at about one-third of its face amount. He did not become the owner of it for the sum it expressed. Filling a trust relation, he could not speculate and make a profit out of the trust property. The profit, whatever it was, belonged to the trust estate. 1 Perry on Trusts, § 428; *Royall v. McKenzie*, 25 Ala. 363. He was not required, however, to sustain any loss by the operation. The estate took the benefit of his bargain, and must assume the burden of the purchase. Whatever of the administrator's private funds went into the purchase, must be regarded as so much money rightfully disbursed for the benefit of the estate. For this he was entitled to a credit in his settlement, as the register rightfully found. And this right was not at all dependent upon that other inquiry, whether the estate or Geo. N. Powell claimed and obtained the land, its rents, and the proceeds of its sale. In either event, the administrator was entitled to a credit for all money paid by him from his personal effects, of which the estate took the benefit. All paid by him personally in the purchase and liquidation of the decreed debt, less the sum realized in the register's sale of the land, falls within this principle, even if he be permitted to hold the land as a personal purchase. The difference, and the only difference is, that if the estate successfully claim the land as purchased for its benefit, then the administrator is entitled to a further credit of the sum paid by him in the purchase of the land. Obtaining the land, the estate must take it with the burden of its purchase. The error in this case seems to have been fallen into, by considering the administrator's right to retain the land, and the right to be repaid the money expended in the purchase of the decree, as elective, or alternative rights, of

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which the successful assertion of one, is the abandonment of the other.

It is contended by appellee that the estate, and not Geo. N. Powell, should have the benefit of the land purchase, and that this would constitute a further debit against the administrator, of the value of the use and occupation, while he held the land, and of the profit he realized in the resale. This, it is argued, will more than compensate him for the credit stricken from his account. We need not and do not decide whether it would be permissible for us to set off one error against another, and thus neutralize the erroneous ruling. In the mere matter of stating an account, cases may arise in which it would be permissible to do so. But the question is not so presented in this record as that we can consider it.

Whether the administrator, when he made the purchase at the register's sale, thereby armed the beneficiary—the distributee—with the right to claim the purchase as being made for the estate, was, at most, a mere matter of option, or election in the distributee. He alone could make the election; for the administrator could not compel him to take the land.

Wiswal v. Stewart, 32 Ala. 433; *Kavanaugh v. Thompson*, 16 Ala. 817. Until election was made and announced, the land remained Geo. N. Powell's. And such election, to be effective, should have been declared in unambiguous terms. In the present case, it should have been averred in the bill, with a proper statement of the facts on which it was based, or, it should have been claimed before the register, before entering upon proof of the value of the use and occupation, or of the profit realized in the resale. Without such declared election, testimony on these questions was immaterial and irrelevant.

The bill avers that the land was purchased with the estate's effects, and incidentally claims it on that account, together with its rents, and the proceeds of the sale. It makes no mention of the true facts, first, of the purchase of the land at the Register's sale, and, second, of the subsequent purchase of the chancery decree; nor, of the clearly established fact, that half or two thirds of the purchase money was paid with the private funds of Geo. N. Powell. And there is no offer to refund to to him, nor to allow him a credit for the sum thus paid. We find nothing in the bill which shows an election, or intention to claim the land, or its profits and product, on the true state of facts, as this record shows they existed. Nor is this indefiniteness of the bill healed or aided, by anything shown to have taken place before he Register. There is an absence of proof that complainant made such election, or asserted such claim, while the account was being taken. True, he made proof of the value of the rents, and of the price at which the

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administrator sold the land; but he contended as earnestly that the administrator's claim of credit for moneys expended in the purchase of the land and the decree should be disallowed, as he did that the rents and proceeds of the land should be made a debit in the account. These claims were incompatible; for if the election had been made and allowed, this would have entitled the administrator to further credit of the sum paid for the land, less the cost of the chancery suit, previously and rightfully allowed, in addition to the credit we have shown above he was entitled to in any event.

The only election shown in this record, if election it can be called, is found in exception No. 9 to the Register's report, copied above. That election is, in large degree, neutralized, by the repugnant position claimed—successfully claimed—in exception No. 8. We are not able to find that, on the facts shown, the distributee has ever elected with sufficient clearness, to claim, the Cantelou land, as being purchased for the benefit of the estate.

It may not be amiss to remark that the chancellor overruled complainant's 9th exception, and thus decided this question of election in favor of the administrator. The administrator alone appeals in this case, and he alone assigns errors. The ruling on the question of election is therefore not before us.

The decree of the chancellor sustaining complainant's 8th exception to the report of the Register is reversed, and the report as made is in all things confirmed. And a decree will be here rendered in accordance with the principles herein above declared.

Reversed and rendered.

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Bill to declare Unconditional Sale a Mortgage, and to Redeem.

1. *Whether conveyance absolute on its face is a mortgage; what necessary to be shown.*—When the contestation is whether a conveyance, absolute on its face, was in fact intended as a mortgage, the party so asserting must show, by clear and convincing evidence, that such was the intention and understanding of both parties; but, where the contestation is whether the transaction was intended as a mortgage or as a conditional sale, with a reservation of the right to repurchase, the same stringency of proof is not required; and if the intention is in doubt, the court inclines to hold it a mortgage.

2. *Absolute conveyance, with stipulation to repurchase.*—In this case, the conveyance being absolute in form, with a stipulation in a separate

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paper of the right to repurchase by a specified day; and the evidence showing that the transaction did not originate in a proposition for a loan, and that no debt existed or continued between the parties; the court declines to treat the transaction as a mortgage.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 15th August, 1884, by Albert Mitchell and Spencer Buckner, and averred that, some time in the year 1882, complainants purchased a lot in the city of Birmingham from the Elyton Land Company, on the installment plan, part of the purchase-money being paid at the time of purchase and the balance to be paid on time; that complainants borrowed the money with which to make the cash payment from Mrs. Fannie Linn, and had the Elyton Land Company's bond for title, made to her to secure the loan; that afterwards Mrs. Linn lent complainants the money with which to pay the balance of the purchase-money, and took the deed to said lot in her own name, to secure the loan made to complainants; that in January, 1883, one Bernhard Wellman, who was engaged in lending money, agreed to lend complainants eight hundred dollars on said lot, and did lend them, at that time, five hundred and forty-five dollars, the balance due Mrs. Linn, which was paid to her, who thereupon executed a deed to the lot to complainants; that said Wellman let complainants have about seventy-five or one hundred dollars afterwards, and released to complainants a store account, altogether amounting to about eight hundred dollars; that Wellman agreed to lend the money for one year, for which he was to receive four hundred dollars as interest. The bill further recites, that for the consideration stated, complainants made a deed of sale to Wellman, who executed to them an agreement to re-convey the lot upon the payment of twelve hundred dollars at the maturity of the loan; that complainants were in possession of the lot at the time of this transaction with Wellman, and continued to live on the lot until some time in April, 1884, when they moved off in consequence of threats made by Wellman to turn them out of doors if they did not pay rent. Complainants offered in their bill to re-pay Wellman the amount borrowed from him, with lawful interest, and prayed to be relieved from usurious interest, claiming that the deed made to Wellman was intended and understood to be a mortgage; prayed for an account, and that complainants be let in to redeem.

The defendant, Wellman, answered, denying that he had made a loan to complainants as claimed by them, but claiming that he bought the lots in controversy for eight hundred dollars, rented it to complainants at a nominal rent, and agreed to allow them to re-purchase at any time within twelve months,

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for twelve hundred dollars; that complainants were indebted to him in a small amount for merchandise sold them, which was embraced in the amount to be paid, and for which defendant gave them a receipt in full; upon the execution of the deed to the lot; that complainant, Spencer Buckner, had sought to borrow money from defendant, but that defendant had refused to lend him money, but when informed by said Buckner that he and complainant, Albert Mitchell, owned the lot, offered to buy it, and give them the option to re-purchase in twelve months, upon paying him twelve hundred dollars; that the transaction was a *bona fide* purchase.

The averments of the bill and the denials of the answer presented the issue, whether the deed made by complainants was intended only as a mortgage. Voluminous testimony was offered by the complainants tending to show that the deed, though absolute in terms, was intended and understood by the parties, only as a security for the loan made by the defendant to the complainants. The defendant sought to show by his own testimony and that of other witnesses that he had purchased the lot subject only to the right of complainants to re-purchase, upon paying him twelve hundred dollars within twelve months from date of purchase. The testimony is in irreconcilable conflict, but a sufficient analysis of it appears in the opinion to show the aspect in which it was presented to the Chancery Court. On final hearing, the cause being submitted on the pleadings and proof, the chancellor dismissed the bill; which action of the court is here assigned as error.

MOUNTJOY & TOMLINSON, for appellants.—1. The chancellor erred in holding that in cases of this kind the proof must be “clear and convincing, even strong and stringent” that the parties intended a mortgage. That rule applies only where it is sought to declare an absolute sale a mortgage, but has no application where the sale is conditional only.—*Turnipseed v. Cunningham*, 16 Ala. 501; *McNeil v. Norsworthy*, 36 Ala. 156; *Turner v. Wilkinson*, 72 Ala. 365. A preponderance of the testimony shows that the parties intended a mortgage and not a sale.

2. The evidence shows that complainants had made with the defendant a contract to borrow money before going to the office of his attorney, where, he claims, another bargain was made, as shown by the deed. There having been a valid agreement to lend the money to complainants, no matter in what form the papers were prepared, if the intention was to secure the loan, they constitute a mortgage.—65 Ala. 390; 35 Ala. 586; 39 Ala. 156; 16 Ala. 477; 1 Jones on Mortgages, §§ 206, 250–1, 273; 3 Pomeroy’s Eq. Jurisprudence, 170;

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Bishop's Equity Principles, § 154; 17 Amer. Dec. §§ 301-2, *notes*.

3. In this case are all the *indicia* of a mortgage. The transaction had its origin in a negotiation for a loan of money; the vendors remained in possession; the so-called purchase-money was used partly in paying off an encumbrance, and partly in improving the property; the party advancing the money knew it was to be so used; there was the existence of an indebtedness and the amount advanced was less than two-thirds the value of the lot.—39 Ala. 159; 27 Am. Decisions, 347; 47 Am. Rep. 553; 16 Ala. 477; 26 Ala. 322; Jones on Mortgages, §§ 273, 600.

McADORY & GILLESPIE, *contra*, cited 29 Ala. 254; 72 Ala. 361; 58 Ala. 37; 37 Ala. 53; 28 Ala. 226; 42 Ala. 32; *Ib.* 477; 27 Ala. 542.

CLOPTON, J.—On January 2, 1883, the complainants and their wives executed to defendant an absolute conveyance of the land in controversy, in consideration of eight hundred dollars; and the defendant contemporaneously executed a separate instrument, granting complainants the right to re-purchase at any time before January 1, 1884, by the payment of twelve hundred dollars, containing a covenant to convey on payment being made. The complainants, having failed to make payment within the time specified, bring the bill to have the two instruments declared a mortgage, and to redeem.

When the contestation is, whether the parties, though making an absolute conveyance, contemplated an *unconditional* sale or a mortgage, the party asserting that a mortgage was intended, must show such intention and understanding of both parties by clear and convincing evidence. But, when it is admitted or shown that the transaction is not an unconditional sale, there being the right to re-purchase, or an agreement to reconvey on specified conditions, expressed either in the deed, or by separate instrument; and the controversy is, whether a *conditional* sale or a mortgage is intended, the same stringency of proof is not required; and if the intention is in doubt, equity leans in favor of considering it a mortgage, as most generally accomplishing complete justice to both parties—*McNeill v. Norsworthy*, 39 Ala., 136; *Turner v. Wilkinson*, 72 Ala., 361. The rule laid down by the chancellor—that the evidence must be clear and convincing, even strong and stringent—is too exacting and rigorous, in a case where the question is whether a conditional sale or a mortgage was intended.

The deed, by itself, is absolute in form. The separate instrument recites the purchase of the land from the grantor,

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agrees to allow a repurchase, and to convey on payment of the amount, within the time stipulated. The conveyance and the separate instrument, having been coterminously executed, and being parts of the same transaction, must be construed as one. Thus construed, they import a sale with condition to repurchase. *Eiland v. Radford*, 7 Ala., 724; *McKinstry v. Conly*, 12 Ala., 678. Persons capable of contracting may make a contract for the sale and purchase of land, with a reservation to the vendor of a right to repurchase at a fixed price, and within a specified time. *Conway v. Alexander*, 7 Cr., 218. The covenant to reconvey may be a circumstance, considered in connection with other circumstances, going to show, but not in itself sufficient to show, that the parties intended a mortgage. Something more than a reservation of a right to repurchase and an agreement to reconvey must be shown.

Each transaction must depend, in a great measure, on its particular circumstances. The ascertainment of the intention of the parties readily suggests itself as the proper mode to determine whether the contract is a mortgage or a conditional sale. As the intention may be made to appear, the court will carry it into effect. That the grantor intended and considered the conveyance as a mortgage, is not sufficient; such must be likewise the intention and understanding of the grantee. *West v. Hendrix*, 28 Ala., 226; *Peoples v. Stolla*, 57 Ala., 53. The intention may be collected from the extrinsic circumstances, and the internal evidence afforded by the papers. Without underrating what may be considered minor tests, the criterion most generally regarded as of controlling significance, is a continued debt, which the grantor is liable to pay, whether it be an uncanceled antecedent debt, or one presently contracted. If there be a subsisting liability, the payment or discharge of which is in fact the payment stipulated in the reservation of the right to repurchase, the transaction is in reality a mortgage, whatever form the papers may assume. But, if there is no existing liability or indebtedness under any circumstances, there is nothing on which to found a mortgage. *West v. Hendrix*, *supra*. The investigation, therefore, is resolved into an inquiry, whether the relation of debtor and creditor existed before, or at the time of the transaction, which is continued; or, if not, whether the transaction commenced in a negotiation for a loan of money, or for other purpose, whereby a liability is created, which the vendor is bound to discharge in the future? All other circumstances and considerations are ancillary to this primary inquiry.

The connection between the parties, except as to a small antecedent debt, commenced with this transaction. There is a conflict between the evidence of complainants and of the de-

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defendant, in respect to the manner in which the transaction began; whether in a negotiation for a loan, or for a purchase. The force of the testimony of complainants and their wives is greatly impaired by the contradictions as to material matters by other witnesses. In view of this conflict, the correct version of the transaction may be satisfactorily ascertained by the consideration of the evidence of the disinterested witnesses, as it may corroborate, or contradict, and illustrate. The complainants had previously purchased the lot from the Elyton Land Company, and borrowed money to pay for it from Mrs. Linn, who had a lien thereon as security for the money thus advanced. She was pressing for payment. It is a circumstance of some significance that, at the time of the transaction between the parties, the lot was in the hands of a real estate agent for sale, in whose hands it had been previously placed by complainants; and who had failed to sell it at nine hundred dollars, the price fixed by them. In this state of affairs, the negotiations between the parties commenced.

As appears from the evidence of the subscribing witnesses, who were also the attorneys who drafted the papers, the complainants and the defendant came to their office, stated to them the terms of the trade as agreed on, and directed them to draw the necessary papers. A few hours afterwards, the defendant and the complainants, with their wives, returned to the office. The papers were read to them, and their character and effect, and the rights of the parties under them, fully explained. No claim was made that a mortgage was intended. The complainants expressed themselves satisfied with the papers as explained; said they contained the terms of the trade as agreed on, and thereupon they were respectively executed by the parties. The complainants spoke of the transaction afterwards as a sale, to other witnesses. One of them was indebted to defendant about ninety-six dollars, for goods previously purchased, which it was agreed should be taken in payment for the lot, *pro tanto*. The notes evidencing the debt were surrendered. A part of the purchase-money was left in the hands of defendant, a portion of which was taken up in goods; and when the balance was paid to one of the complainants, in March, subsequently, he executed a receipt "as balance in full of payment of eight hundred dollars for house and lot." By the agreement, the complainants were to have the use and possession, at a nominal rental, until January 1, 1884, at which time their right to repurchase expired, as a part of the consideration paid, and defendant gave them a written lease for this purpose. This rebuts any inference that might otherwise be drawn from an unexplained, continuing possession, and tends to show that complainants recognized the transaction as a sale, and consented 'to

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hold under the defendant as his tenants. After January 1, 1884, they promised to pay rent, and made a small partial payment; and on a subsequent demand to pay rent or vacate the lot, they vacated it without objection or claim. We do not think that the evidence shows any marked disparity between the value of the property and the price paid.

It would be too tedious, and an unnecessary and unprofitable extension of this opinion, to consider the evidence, which is somewhat voluminous, in all its details. We have attended generally to the salient facts, which we ascertain to be established. On a full and careful examination, we conclude that the transaction did not commence in a proposition to borrow money, that the writings express the full terms of the agreement, and that the transaction is a sale with condition to repurchase. There was no subsisting or continuing debt, which the vendors were bound to pay at any future time.—*Peeples v. Stolla, supra*; *Eiland v. Radford, supra*.

Affirmed.

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Bill in Equity to set aside a Deed of Conveyance for Fraud; and for Settlement of Guardian's Account.

1. *Relieving minors of disability; impeaching equity decree.*—In relieving minors of the disability of infancy (Code, §§ 2735–41) the Chancery Court exercises a special and limited jurisdiction, and its decrees stand on the same footing as the judgments of courts of limited and inferior jurisdiction, whose recitals of notice or appearance may be impeached and contradicted, in a collateral proceeding, by extrinsic evidence.

2. *Same; requisites of petition.*—When the infant has a guardian, the petition asking to be relieved of the disabilities of non-age must be signed by the infant in person, and the guardian must join in the petition; and if signed by the guardian, in the name of the infant, but without his knowledge or consent, the decree founded on it is a fraud on the jurisdiction of the court, which the court will set aside on a direct proceeding, or, without setting it aside, will prevent the guardian using it against the infant.

3. *Guardian's settlement; requisite proceedings.*—A settlement of the guardian's accounts in the Probate Court, made during the minority of the ward, before the resignation of the guardian, and without the appointment of a guardian *ad litem*, is void for want of jurisdiction; and a decree in chancery removing the ward's disabilities as an infant, fraudulently procured by the guardian, imparts no validity to the settlement.

4. *Ward suing guardian after attaining majority to avoid settlements made.*—A bill in equity filed by a ward within twelve months after at-

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taining majority, seeking to compel a settlement of the accounts of his guardian, and to set aside conveyances executed by him to his guardian during his minority, based on a void settlement rendered by the Probate Court, is neither multifarious, nor wanting in equity.

APPEAL from the Chancery Court of Autauga.

Heard before the Hon. S. K. McSPADDEN.

This was a bill filed by H. T. Johnson and his wife, whose maiden name was Willie Caver, against Noah W. Cox, and was commenced October 5th, 1885. The object of the bill was to re-open and settle the guardianship accounts of the defendant with his former ward, the said Willie Caver, and to annul and set aside a deed executed by Willie Caver to Noah W. Cox, conveying her paternal estate in lands, which was alleged to have been fraudulently procured by the said Cox a short time before her marriage to her husband, H. T. Johnson.

The bill alleges that the father of Willie Caver died in 1862; that her mother married the defendant, Cox, in 1865, and died in 1867; that her surviving husband became the guardian of Willie, and both, guardian and ward, resided on the estate of the ward till the 12th of December, 1881; that some time prior to the last named date, some person, acting at the instance of Noah W. Cox, and without the knowledge, wish or consent of Willie, filed a petition in the Chancery Court, to which Willie's name was signed, praying that she be relieved of the disabilities of non-age, under the statute providing therefor; upon which petition and proof sustaining the allegations thereof, the chancellor granted the prayer of the pretended petition; that the first information Willie had of these proceedings was on the 12th of December, 1881, when she was brought by Cox to the court house at Prattville; that said Cox, while on the way, informed oratrix that he wished to make a settlement with her, and then informed her that she had been relieved of the disabilities of non-age; that oratrix was taken into the probate office by Cox, where she was shown some papers and asked some questions, of which she remembered nothing definitely; that immediately after said pretended settlement, on the same day, the said Cox proposed a purchase from oratrix of the real estate upon which she and the said Cox had resided since his marriage with the mother of oratrix, containing about 320 acres of land, which Cox represented to oratrix was worth about fifty cents per acre, but which was in fact worth about \$2 per acre; that Cox had a deed ready prepared, which oratrix signed at the request of the said Cox, her step-father and guardian. That part of the bill seeking a re-opening of the guardianship settlement recites that oratrix was charged board at exorbitant rates by her guardian, for fourteen years, while the guardian was living on oratrix's land, and while using

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oratrix as a menial in his family by requiring her to cook, wash and iron, and do other servant's work about the place, for which service no compensation was allowed oratrix in said settlement; that Cox falsely represented to oratrix that in his settlement of her guardianship he had not charged her anything for board, and that it was only about eight months before the filing of her bill that oratrix had discovered that such representation was false. The bill further shows that it was filed within less than two years after oratrix attained her majority. The defendant demurred to the bill, on the grounds that it was multifarious, and that more than two years had elapsed since the final settlement of the guardianship and the commencement of the suit. These demurrers were overruled, and this action of the court is assigned as error on appeal.

C. S. G. DOSTER, for appellant.

SADLER & HOLMES, *contra*.

SOMERVILLE, J.—Taking as true the facts stated in the bill, as we are compelled to do on demurrer, the defendant can not be permitted to found any right on, or obtain any protection from the decree of the Chancery Court, rendered October 7th, 1881, purporting to relieve the complainant, Mrs. Johnson, of the disabilities of infancy or non-age. The Chancery Court, in affording such relief to minors, exercises a limited jurisdiction, or special statutory power, which stands on the same footing with the proceedings of courts of limited and inferior jurisdiction. *Cohen v. Wollner*, 72 Ala. 233; *Ashford v. Watkins*, 70 Ala. 156. And decrees or judgments rendered by courts of this class are exempt from the rule, applicable only to courts of general jurisdiction, that parol evidence is inadmissible to contradict the record of the court reciting the appearance of the parties in person or by attorney, in the case of domestic judgments, even though such unauthorized appearance is a fraud or a forgery, unless on bill filed by the defrauded party, properly framed, with the view of impeaching such record. *Freeman on Judg.* (3d Ed.), § 134, note 1; *Ferguson v. Crawford*, 70 N. Y. 253; s. c. 26 Amer. Rep. 589. It is permissible to attack such judgments, even collaterally, by extrinsic proof showing that the recitals of notice or appearance were in fact false, and that, for this reason, the court rendering the judgment had no jurisdiction over the parties, which is equally essential with jurisdiction over the subject-matter in all proceedings not purely *in rem*.

The bill alleges that the petition to remove the complainant's disabilities of non-age was prepared collusively by the attorney

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of the defendant, who was her guardian and her step-father, and was signed in her name and filed in the chancery court, without her knowledge or consent. Complainant was then about nineteen years of age, and was known to her guardian to be on the eve of impending marriage to her co-complainant, who is now her husband. The defendant had been her guardian for about fourteen years, in the possession and management of all her property, and largely indebted to her. The motive for a speedy settlement, hastened in time to escape a rigid overhauling of his accounts by the intended husband, was very strong. The action of the Chancery Court was needed to sweep away the only obstruction to this plan, and the bill alleges that this was obtained without the complainant's desire, knowledge or consent, that she knew nothing of its legal effect when first informed of it, and that the purpose of her guardian in proving it was to cover up his defalcations and defraud her of her property.

The statute requires that the minor should have signed the petition in person, and that her guardian should join with her. Code, 1876, § 2735, sub-div. 3. If this was not done the court had no jurisdiction to render the decree relieving complainant of her disabilities of infancy; the decree itself would be fraudulent, and, whether it sought to be regularly impeached or opened in this bill or not, a court of equity will preclude the defendant from taking any advantage of such a judgment, of which he can not in good conscience and all honesty avail himself. As said by this court in *Lee v. Lee*, 55 Ala. 590, 602, the court, even without vacating the judgment, "may prevent the parties guilty of the fraud from taking any benefit under the judgment or decree, either as a ground of relief or defense, and leave its vacation to the tribunal pronouncing it." Freeman on Judg. (3d Ed.) § 134, p. 148, note.

In this aspect of the case, the settlement made in the Probate Court of Autauga county, or rather what purports to be such, by the defendant, was void for want of jurisdiction in that court. It was made during the minority of the ward, and before the resignation of the guardian, and the ward was not represented by a guardian *ad litem*. The case of *Glass v. Glass*, 76 Ala. 368, is conclusive on this point. And it becomes immaterial to enter upon any consideration of the inquiry as to what the rule would be if the bill were filed to correct errors of law or fact in the settlement of a guardian's account, under sections 3837-3839 of the present Code. Both the original and the amended bills aver facts which show that the entire settlement was a void proceeding, without the jurisdiction of the court undertaking to make it.

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The suit then becomes one simply to remove the settlement from the Probate to the Chancery Court, and to set aside certain conveyances of property made by the ward to her guardian, during her minority, at a grossly inadequate price, and while the trust relationship of guardian and ward was still existing. The mere statement of the case shows that the bill is neither multifarious nor otherwise wanting in equity. *Voltz v. Voltz*, 75 Ala. 555; *Noble v. Moses* 74 Ala. 604. Nor can there be any question whatever that it was filed in time, as the suit was instituted within less than a year after the ward became of age, and so soon as she was apprised of the fraud that was practiced upon her.

The demurrer to the bill was properly overruled and the decree is affirmed.

Reeves v. Brooks.

Bill in Equity, by Widow, for Assignment of Dower and Homestead.

1. *Right of widow before assignment of dower.*—The widow has no legal estate or interest in the lands of the deceased husband until a specific part of the land is allotted and set apart for her dower estate; her interest, until then, being equitable, in its nature a right lying in action.

2. *Assignability of widow's dower interest before allotment at law.*—The right of dower not being a legal estate, before assignment, is not, in law, the subject of conveyance to a stranger. Notwithstanding such conveyance the heir may successfully maintain ejectment against the grantee for the recovery of possession.

3. *Same; in equity.*—In equity the interest of the assignee is protected, and he is treated as succeeding to the right of the assignor, and as the owner of the thing transferred. The assignment of the widow's right of the dower, before allotment, though inoperative at law, is effective in a court of equity that will, in a proper case, enforce her transfer, and protect the rights of her transferee.

4. *Estoppel of widow by joining in deed with heirs.*—Where the widow unites with the heirs in a warranty deed conveying all the right, estate and interest of the grantors, and reciting that the consideration was paid to all of them, the equitable estate of the widow is merged in the legal estate conveyed by the heirs; and she will not be heard to gainsay the title of the grantees by asserting a claim to either dower or homestead.

5. *Right of widow to rents during quarantine.*—Under the statute, § 2238, *Code*, the widow may retain possession of the dwelling and the plantation connected therewith, until the assignment of her dower. During such time she may rent the premises; and, if the administrator, heir or other person, receives the rent, she may recover it from him.

APPEAL from Lowndes Chancery Court.

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[Reeves v. Brooks.]

Heard before the Hon. JNO. A. FOSTER.

This was a bill filed by Harriet Reeves, the widow of Richard Reeves, deceased, praying for the allotment of dower and assignment of homestead in the lands of her late husband, being 230 acres; and for the recovery of crops grown thereon, and rent accruing pending her quarantine. The suit is against Brooks Bros., a partnership, and the heir at law, and was commenced April 22, 1885. The bill, after describing the lands owned and occupied by Richard Reeves at the time of his death, alleges that he died without owing any debts; that the heirs at law were of full age, and that no administrator had ever been appointed; that said Richard Reeves died in 1878; that his sons J. D. Reeves, and R. A. Reeves, bought out the interest of the other heirs and had occupied the premises with the complainant, and controlled the lands of the estate, since January 1882, and had turned over to the defendants, Brooks Brothers, the crops of cotton made thereon. The prayer of the bill is for an assignment of dower and the setting apart of the homestead in the premises to the complainant, and that said Brooks Brothers be made to account to complainant for the cotton received by them from said lands since 1882, and for the value of the rent, for the current year 1885; and for such other relief as complainant may be found entitled to.

The respondents, Brooks Bros., answered the bill, averring that after the death of her husband, complainant, with her two sons, J. D. Reeves and R. H. Reeves, occupied the lands of the estate, and carried on the farm; that respondents made advances each year to them, for the purpose of enabling them to do so, taking a lien on the crops to be grown, and mortgages upon the land and stock, &c.; and that the whole amount received by them from said place during the time referred to in complainant's bill, was \$604.55 which had been applied to the indebtedness of complainant and her sons J. D. and R. H. Reeves, and for which credit was duly given them. The answer further avers that on the 21st day of January, 1885, complainant united with her two sons, J. D. and R. H. Reeves, in an absolute sale of the lands described in the complainant's bill, to respondents, for the *bona fide* consideration of one thousand dollars; that at said date a deed to said lands, containing covenants of warranty, was executed by the complainant and her said sons and delivered to respondents, who were put in possession of the premises; that about two weeks afterwards respondents rented the dwelling house and about fifteen acres of the land to J. D. Reeves for the year 1885 for one bale of cotton. The deed is set out and made a part of the answer of the respondents. Upon this state of facts the chancellor decreed that the complainant was not entitled to relief and dismissed her bill; from which action of the court, this appeal is taken.

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WATTS & SON, for appellant.

R. M. WILLIAMSON, *contra*.

CLOPTON, J.—The bill is brought by appellant to have an assignment of dower in land, of which her husband was seized, and which was his homestead at the time of his death, and to have an account of rents and profits.

Dower, arising by operation of law from the marital relation, is an inchoate and contingent right pending the coverture, which is consummated on the death of the husband, the wife surviving, and entitles her to a free hold estate in the land. Until dower is assigned, the widow has no legal estate or interest in the land. Until a specific part of the land is allotted and set apart for her dower estate, her interest is equitable, and its nature a right lying in action. The assignability of such interest depends on the form, in which the question may arise—whether at law or in equity. Having no legal estate, the right of dower, before assignment, is not the subject of conveyance to a stranger, of which a court at law can take cognizance. Such conveyance does not entitle him to an allotment of dower in his own name, nor is it a foundation for any claim in an action at law. The heir may successfully maintain ejectment against the grantee for the recovery of possession.—*Barber v. Williams*, 74 Ala. 332; *Turnipseed v. Fitzpatrick*, 75 Ala. 297; *Saltmarsh v. Smith*, 32 Ala. 404; *Wallace v. Hall*, 19 Ala. 367.

In equity the rule is different. By the common law, a right or chose in action is not assignable. An assignment conveyed no interest or right to the assignee, which a court of law would recognize to any extent or for any purpose. Equity, however, recognizes an interest in the assignee entitled to protection, and treats him as succeeding to the rights of the assignor, and as possessing ownership of the thing transferred. The assignment of a thing in action for a valuable consideration creates a substantive right of property, which a court of equity will, under proper circumstances, uphold and enforce. The widow's right of dower, before assignment, being a right of action and being equitable, comes within the operation of these principles; and though a conveyance of such right is inoperative at law, a court of equity will, in a proper case, enforce her transfer, and protect the rights of her transferee.—*Strong v. Clem*, 12 Ind. 37; *Payne v. Becker*, 87 N. Y. 153; 2 *Scribner Dow*. (2 Ed.) 45. We do not understand *Saltmarsh v. Smith*, *supra*, as in conflict with these views, when the facts of the case are considered. In that case, the land was not sold by the husband, nor was the consideration price paid to him; but was sold

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after his death by a purported agent, when his power of attorney had been terminated. The transfer of the right of dower was made, as expressed therein, on a valuable consideration paid to the husband, which was not true. The deed of the agent was ante-dated, so as to purport to have been executed in the lifetime of the husband ; and no valuable consideration was paid to the widow for her transfer. On these facts, the court held, that the grantee had no title to the real estate, legal or equitable, either under the deed or otherwise, and that the widow's transfer was wholly inoperative ; and refused to enforce it, by way of deduction of the reasonable value of the dower interest from the grantee's claim of indebtedness against the husband, as against his other creditors, who had filed the bill to subject the land ; the estate of the husband having been declared insolvent.

On January 21, 1885, the complainant and her two sons, to whom the other heirs had previously sold and conveyed their interest, executed to the defendants a conveyance of land, containing covenants of warranty, in consideration of one thousand dollars. It is unnecessary to decide, whether a conveyance of the entire land to another, in making which the widow unites with the heirs, in whom the fee is vested, and who, with her, are in possession, operates as a release to the terre tenant, or by way of extinguishment of her right of dower. The deed purports to convey all the right, estate and interest of the grantors, and recites that the consideration was paid to all of them, as to which there is no contradictory evidence. The suit is in equity, instituted by the widow, who claims dower notwithstanding the deed. Fraud, imposition, or undue advantage is not alleged or proved. If as to the complainant, the conveyance be regarded as only a transfer of her right of dower, being supported by a valuable and sufficient consideration, a court of equity will protect the rights of her assignees. If, in such case, there was an assignment of dower, it would enure in equity to the benefit of the alienee ; and inasmuch as the defendants have a conveyance of the land, by which the equitable interest of the complainant is merged in the estate conveyed by the heirs, an allotment would be useless and unnecessary. Moreover, the complainant, by uniting in the covenants of warranty, has estopped herself from denying that she had an indefeasible estate which passed by the deed, and will not be heard to gainsay the title of the defendants, by asserting a claim of either dower, or homestead exemptions.—*Jones v. Reese*, 65 Ala. 134 ; *Mattock v. Lee*, 9 Ind. 298 ; *Grant v. Parham* 15 Vt. 649.

Under our statutes the widow may retain, free from the payment of rent, the possession of the dwelling-house, where her

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husband most usually resided next before his death, and the plantation connected therewith, until her dower is assigned. *Code*, § 2238. The object of the statute is to provide for her a support until dower is allotted, on which she may enter. For this purpose she may rent the premises, and if the administrator, or heir, or any other person, receives the rents, she is entitled to recover them. *Inge v. Murphy*, 14 Ala., 289; *Boynton v. Sawyer*, 35 Ala., 497; *Oakley v. Oakley*, 30 Ala., 131. She may transfer or otherwise utilize the rents and profits as she deems most expedient. They are subject to her absolute disposal. The complainant and her sons continued to occupy the premises after the death of her husband, and the sons managed and cultivated the lands. She and one of her sons in January, 1882, and she and both of her sons in February, 1884, mortgaged the lands and the crops raised thereon to the defendants to secure the payment of the joint indebtedness recited in the respective mortgages as having been contracted to obtain advances to enable them to make the crops. The cotton received by the defendants was delivered in part payment of the mortgage debts. The defendants received the cotton, with the consent of complainant, by her authority, and in performance of contracts made with her. Under such circumstances the complainant will not be heard to say, that the defendants received the cotton wrongfully, and will not be suffered to call on them to account to her for the cotton or its proceeds. She has had the use and occupation of the premises, and has enjoyed the income and profits, the same having been appropriated to an indebtedness, for which she was jointly liable with others, and which was contracted for their joint benefit. Unmasked and stripped of the adventitious circumstances, the case is that of a debtor, who, his own funds having been applied in payment of a joint debt, calls on the creditor to refund on the ground that the funds used were her undivided property, and that others were liable for the debt.

Affirmed.

Flouss & Kennedy v. The Eureka Co.

Action for Damages for Breach of Contract.

1. *Breaches must be alleged in complaint.*—The plaintiff having agreed and undertaken, for a specified price, to unload for defendant certain cars laden with lime rock “at such times and places as may be ordered

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by defendant," an action does not lie to recover the stipulated compensation, unless the service was ordered or directed by defendant, or was performed by his authority, express or implied ; and the fact that it was so done must be alleged in the complaint.

APPEAL from Jefferson Circuit Court.

Tried before the Hon. S. H. SPROTT.

This was an action brought by Flouss & Kennedy, a partnership, against the Eureka Company, a domestic corporation, to recover damages for an alleged breach of a contract set out in the complaint, which is in the following language : " The plaintiffs claim of the defendant one thousand dollars for the breach of the condition of an agreement entered into by and between the plaintiffs and the defendant, which was in words and figures as follows, viz : "*Memo.* of a contract entered into by and between the plaintiffs and the defendant, this the 1st of February, 1879, between the Eureka Company of the first part and Flouss & Kennedy of the second part, witnesseth, that the party of the second part agrees to unload in a prompt and satisfactory manner all the cars of coke and all the cars of iron ores and lime rock at such times and places as may be required and ordered by the party of the first part ; and, the said parties of the second part do further agree that they will furnish the tools, lights, implements, and everything necessary in said work, and keep the same in repair at their own cost. For and in consideration of the faithful discharge and performance of the above agreement by the party of the second part, the party of the first part hereby agrees to pay the said party of the second part seven cents per ton for all coal, and six cents per ton for all iron ores and lime rock so unloaded at their furnace at Oxmoor, Ala., for one year, to-wit : till February 1st, 1880.

EUREKA COMPANY, [L. S.]

by J. W. Sloss, President ;

FLOUSS & KENNEDY." [L. S.]

" Yet, although the plaintiffs have complied with all the provisions of said agreement, on their part, the defendant has failed to comply with the following provisions, viz : by failing and refusing to pay said plaintiffs for any of the cars of lime rock that were delivered and unloaded at said furnace from the fifteenth day of July, 1879, to the 6th January, 1880, for which said defendant was required to pay said plaintiffs by the terms of said contract ; wherefore plaintiffs bring this suit."

To this complaint, the defendant demurred :

" *First*, Because the said complaint shows that the contract sued upon requires the defendant to pay for only such cars of lime rock as were actually unloaded by plaintiffs, and the complaint shows that the defendant has paid the plaintiffs for all that said contract required the defendant to do."

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"*Second*, Because said complaint shows that the defendant was to pay the plaintiffs for only the lime rock unloaded at such times and places as may be required and ordered by the defendant, and this the complaint shows has been paid, and the complaint does not allege the contrary."

"*Third*, Because said complaint shows no right of action against the defendant." The court sustained the demurrers, to which ruling the plaintiffs excepted, and declined to plead over. Judgment was rendered for defendant, and the plaintiffs take this appeal.

GREGG & CABALOU ; HEWITT, WALKER & PORTER, for appellants.

R. H. PEARSON, *contra*.

SOMERVILLE, J.—It is our opinion that the Circuit Court placed the correct construction upon the contract set out in the complaint. By its terms it imposed no obligation on the plaintiff to unload the cars except "at such times and places as may be ordered" by the defendant. The defendant would not, therefore, be liable to pay the contract price agreed to be paid for unloading the cars of lime rock, unless such service was ordered or directed, or unless it had been actually performed by the express or implied authority of the defendant, or its corporate agents or officers. The complainant fails to aver either of these alternatives. The failure of the defendant to order the service to be performed was within its discretion, and was not actionable, even had it been declared as a breach, which is not the case.

The demurrer was properly sustained, and the judgment is affirmed.

Ballard v. Johns.

Petition in Probate Court, by Tenant in Common, for Sale of Real and Personal Property for Distribution.

1. *Requisites of application*.—In an application for the sale of property for division or distribution among several tenants in common (Code, §§ 3498, 3515), the petition must set forth the names and residences of all the parties interested in the property, and this statutory requirement, which is jurisdictional, includes the petitioner.

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2. *Same ; death of co-tenant.*—If the petition shows that one of the tenants in common has died, it must show to whom his interest has descended, or in whom it has become vested, and such persons must be made parties.

3. *Administrator ad litem for deceased co-tenant.*—If it appears that the deceased tenant owed debts at the time of his death, the court should appoint an administrator *ad litem* to protect the interest of creditors.

4. *False claim does not oust jurisdiction.*—Although a partition or sale can not be decreed by the Probate Court, where an adverse claim or title is asserted (Code, § 3512), yet the jurisdiction of the court will not be ousted by a false assertion of an adverse claim by one of the defendants.

5. *Surviving husband necessary party.*—The surviving husband of a deceased tenant in common is a proper and necessary party to proceedings for partition.

APPEAL from Montgomery Probate Court.

Heard before the Hon. F. C. RANDOLPH.

The facts sufficiently appear in the opinion.

MOORE & FINLEY, for appellants.

WATTS & SON, *contra*.

SOMERVILLE, J.—The case is one originating in an application by a tenant in common of real and personal property to have it sold for distribution, on the ground that it can not be equitably partitioned or divided among those interested, without a sale.—Code, 1876, § 3515.

1. Such an application is required by statute to set forth the names of all the persons interested in the property prayed to be sold, and their residences, giving a full and accurate description of the property, with a statement of the interest of each person in the same, and of the number of shares into which it is to be divided.—Code, 1876, §§ 3498, 3515. And these allegations have been held to be jurisdictional.—*McCorkle v. Rhea*, 75 Ala. 215.

2. The present application is defective in failing to state the residence of the petitioner. The requirement of the statute is that the names and residence of “*all* the parties interested in the property” must be set forth. The exaction is statutory, and includes the petitioner as well as the other parties interested.—Code, § 3498.

3. It fails, moreover, to aver with sufficient certainty the interest of the parties. Ellen Johns, who was one of the heirs of a common ancestor, Zephaniah Johns, is averred to have died before the filing of the petition, but it is not averred that she died without issue, or that the other persons named are her heirs, and how they are such. The Probate Court, in pro-

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ceedings of this nature, deals with the legal title of the lands, and must know in whom it is vested and who is seized of the freehold. Our statutes nowhere abrogate the established rule of pleading, that where one claims by inheritance he must, in general, show how he is heir, and if he claims by mediate, not immediate descent, he must also show the pedigree.—Stephen on Pl. (Tyler) 293.

These defects are sufficient to require a reversal of the judgment and a remandment of the cause.

4. Where the petition states, with sufficient particularity, the contents of the application, as required by the statute, including especially “the interest of each person” in the property sought to be divided or partitioned, and “the number of shares into which it is to be divided,” and it is further made to appear, by averment and proof, that one or more of the tenants in common, or joint owners, had died owing debts at the time of their decease, the Probate Court, in our judgment, would be authorized to appoint an administrator *ad litem* to protect the interests of the creditors of such decedent under certain circumstances. The statute itself would, in many cases, become a dead letter if this was not so. Section 3515 of the Code, 1876, authorizes such an application to be filed by the executor or administrator of a deceased person in interest; and section 3520 provides that “should any of the parties interested in property, whether the same be real or personal, held in common, die, then the provisions of this chapter [relating to the whole subject of partitioning or dividing property among joint owners] shall fully apply to his executor or administrator.” These sections must be construed to authorize a personal representative of such decedent to be made either party plaintiff or defendant to such a proceeding.

5. The appointment of an administrator *ad litem*, was authorized by the act approved March 17, 1875, now comprising sections 2625–2630 of the Code of 1876. A probate judge, since the passage of this act, is empowered, in all proceedings pending in his court, to appoint an administrator *ad litem*, for the particular proceeding, whenever the necessities of the case require that the estate of a deceased person should be represented, and there is no executor or administrator of such estate, the facts rendering such appointment necessary appearing in the record of the case, or being made known to the court by affidavit of one interested. No bond is required of such appointee, and he is not authorized to receive any money of the estate. The judgment may be rendered in his favor, for the use of the estate, but the officer collecting it pays it over to the judge of probate and not to the administrator *ad litem*.—Code, 1876, § 2626.

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6. The averment of the petition that, "the estate of Ellen Johns" was interested in the property, taken in connection with the other facts stated, must be construed to mean that the administrator *ad litem*, representing the creditors of the decedent, was interested in the proceeds of such property to the extent mentioned.

7. The jurisdiction of the Probate Court was not ousted by the mere unsubstantiated assertion of an adverse claim or title, by the defendant, Ballard, to the land described in the petition. It is true that section 3512 of the present Code seems to so declare by providing that "no division or allotment can be made under this chapter, where an adverse claim or title is asserted by any one, or brought to the knowledge of the commissioners, or judge of probate." This but announces an old rule long made applicable to the entertainment by Chancery Courts of bills for partition of real property, the purpose of which was to prevent the making of a proceeding of this nature a substitute for an action of ejectment to try controverted land titles. A false or unsupported assertion of adverse claim or possession, by a defendant, is not sufficient. There is required a *bona fide* assertion of such fact, as a true existing *status*, as distinguished from a bare denial of complainant's title. This the court must investigate, with the view of inquiring whether it is well or ill founded. If it is clear that there has been in reality no such adverse possession, as to have constituted a disseizen or ouster of the petitioner—destroying the holding together of the joint owners—and that the complainant's title is good, or, that the court can entertain, on the facts presented, no serious doubts as to such title, it may proceed to hear the application. If this were not so, as has been well said, this jurisdiction would be placed "at the mercy of every profligate or unconscientious defendant, and render the court the mere ministerial agent to carry into effect the wishes of parties in cases where there were no matters of controversy between them."—*Overton v. Woolfolk*, 6 Dana, 374; *Freeman on Co-tenancy and Partition*, §§ 502, 147; *Trial of Title to Land* (Sedgw. & Wait) § 167; *Fennell v. Tucker*, 49 Ala. 453, 458; *McMath v. DeBardelaben*, 75 Ala. 68; *Deloney v. Walker*, 9 Port. 497; *Straughan v. Wright*, 4 Rand. 493; Code, 1876, §§ 3512, 3893; *Guilford v. Madden*, 45 Ala. 290.

The holding of one tenant in common is presumptively friendly to his co-tenants, and this presumption must usually continue until it is rebutted by proof of expulsion or ouster by the one or the other.—*Brady v. Huff*, 75 Ala. 80; *Angell on Lim.*, § 419.

In this case the court did not err in holding that there had been no adverse possession by the defendant Ballard, and that the plaintiff's title was unembarrassed by serious doubt.

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8. It is insisted that the defendant, Zack Ballard, is not a proper party to this proceeding for partition, because he holds a mere life-estate in an undivided third part of the land. This interest or estate is created in him by section 2714 of the Code (1876), which gives the surviving husband of a deceased married woman, who may die intestate, seized of a separate estate, consisting of realty, "the use of the realty during his life." The statute requires all persons interested in the property to be made parties, and, even if this be construed to mean interested as joint owners or tenants in common, the husband would certainly, under the circumstances, be a tenant in common. All persons who hold by unity of possession are tenants in common. No unity of tenure, or unity of estate, is required, but only unity of the right of possession, although all of these unities may co-exist, and often do, in such tenancies.—4 Kent. Com. 367; Freeman on Co-ten. & Par. § 86. It is no objection, therefore, that one may hold his part in fee, and another for life, as in this case. Those so holding are still tenants in common.—Law of Real Property (Boone), § 357; 2 Black. Com. 191. It has been accordingly held that the widow of a tenant in common, who was entitled to dower in his undivided share, was not only a proper but a necessary party, to a proceeding for partition by one tenant in common against the others, although she would not be, if her deceased husband had been an owner in severalty, or of the entire premises in his sole right.—*Coles v. Coles*, 15 John. 319; Freeman on Co-ten. & Par. § 472.

9. The statute requiring the defendant, Ballard, to be made a party, his interest as a tenant in common, although but a life estate, is necessarily bound by a judgment ordering a sale of the land. The claim which he thus had upon an undivided third of the realty is by the sale transferred to the fund or money into which the realty has been converted. How the court shall proceed to ascertain this interest in money the statute fails to specify. The case is clearly one of legislative omission. Whether the end can be reached by a bill in equity, making all persons parties who are interested in the fund, or only by additional legislation curing the defect in the present statute, we are not now called on to decide. This obstacle, however, does not divest the Probate Court of its jurisdiction, which is clearly conferred in express words by the statute as it now stands.

What we have said must operate to reverse the judgment, and remand the cause, which is accordingly ordered.

Blake et al. v. Harlan et al.*Proceeding in Probate Court Contesting Validity of Will.*

1. *Misjoinder; when objection to, waived.*—When the probate of a will is contested by one of the testator's children, who is a married woman, if it is improper to join her husband with her as a contestant, the misjoinder is waived by joining issue and going to trial on the merits, and is not available on motion in arrest of judgment.

APPEAL from the Probate Court of Cleburne.

Heard before the Hon. T. J. BURTON.

A petition was filed in the Probate Court of Cleburne by John Blake and Henry Blake, propounding for probate what purported to be the last will and testament of Thomas Blake, deceased, in which proponents, who were his sons, were named as executors. Citations were issued to the next of kin, who appeared and filed their objections in writing to the probate of the will. The contestants were John F. Hilton, and his wife, Celia Hilton, and S. W. Harlan and his wife, Mora Harlan. The trial was by jury, who found against the validity of the will. A motion in arrest of judgment was made by the proponents, on the ground that S. W. Harlan and John F. Hilton were improper parties to said contest, and were improperly joined with their wives as co-contestants. This motion was overruled by the court.

For some cause not appearing upon the record, but as appears from the opinion of the court, the bill of exceptions was stricken from the record, which renders it unnecessary to note the numerous assignments of error on appeal.

JOHN T. HEFLIN, for appellant.

ELLIS, SMITH & BAKER, *contra*.

SOMERVILLE, J.—The statute relating to contesting the validity of wills, when presented for probate, provides that they may be contested not only by “any person who, if the testator had died intestate, would have been an heir or distributee of his estate,” but by “any person interested therein.” Code, 1876, § 2317. In such cases the person making application to probate the will occupies the attitude of a plaintiff, and the contestant of the will that of a defendant.

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In this case two of the children of the testator, who were married women, were the contestants, and their husbands united with them in the contest. The appellants, as plaintiffs, joined issue with them, without raising any question as to an improper joinder of the husbands as parties defendant. The Probate Court decided against the validity of the will, and rejected it. It was objected, after verdict and judgment, that the contest should have been made by the married women alone, and that their husbands should not have been permitted to join them. This objection was sought to be raised by a motion in arrest of judgment. We need not decide whether this contest may be properly characterized as a suit relating to the separate estate of the wife, such as to require her to be sued alone, under the provisions of section 2892 of the present Code. *Mohon v. Tatum*, 69 Ala. 466. It is enough to say that the plaintiffs went to battle on the issue presented as to the validity of the will, without objection on the score of parties, and it was too late for them to afterwards raise the objection. This was an admission that all the contestants were interested in the contest, and was a waiver of any objection based on the want of interest in any one or more of them. If the issue had been decided against the appellees, they could certainly have derived no benefit from the alleged misjoinder by motion in arrest of judgment against themselves. No more should the appellants be permitted to do so.

The bill of exceptions having been stricken from the record, no other question is raised for our decision.

Judgment affirmed.

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Suit for Damages against Common Carrier, for Loss of Freight.

1. *Consignee allowed reasonable time to remove freight; when railroad company liable only as warehousemen.*—A consignee is allowed a reasonable time to remove goods after arrival at point of destination, and until expiration of such time the liability of the company, as a carrier, continues; but, on the failure of the consignee to remove them in a reasonable time, the railroad company is responsible thereafter, only as a warehouseman.

2. *What stipulation in bill of lading unreasonable.*—A stipulation in a bill of lading that the railroad company shall be liable only as a warehouseman, after the arrival of the freight at point of destination, and that the consignee shall receive and take it away as soon as it is

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ready for delivery, without providing for notice to the consignee when it is so ready for him, is unjust and unreasonable.

3. *Carrier's common-law liability may be limited by special contract.* A provision in the bill of lading exempting the railroad company from loss or damage "by fire or other casualty, while in transit, or in depots, or places of transshipment," to goods shipped, will be sustained, *except* as against losses resulting from a want of skill, or from the negligence of the agents or employees of the company.

4. *Liability for goods lost, limited to value at place of shipment, just and reasonable.*—A stipulation in the contract of shipment by the railroad company, that in the event of the loss or damage to goods the company will only be responsible for their value at the place and time of shipment, is just and reasonable.

APPEAL from Morgan Circuit Court.

Tried before the Hon. H. C. SPEAKE.

This action was brought by A. A. Oden, surviving partner of Oden & Bibb, against the Louisville and Nashville Railroad Company, to recover damages for the loss, by fire, of a bale of cotton shipped by plaintiff on defendant's railroad from Hartsell, in Morgan county, Ala., consigned to Trabrue & Co., Louisville, Ky., and was commenced on the 20th of March, 1885. Defendant pleaded specially the contract with plaintiff "that said company should not be liable for loss or damage, of said bale of cotton, by fire, while in depot at point of delivery." On this plea issue was joined.

It was shown by plaintiff that on the 4th of November, 1884, he delivered to the defendant railroad company, at Hartsell, one bale of cotton, marked O. & B., weighing five hundred pounds, to be transported by said railroad company as freight, to Louisville, Ky., and there to be delivered to Trabrue & Co., for which he received a bill of lading; that said bale of cotton was never delivered to the consignees, but was totally destroyed in the depot of defendant, at Louisville, on the night of the 9th of November, 1884. Evidence was introduced by plaintiff to show that the consignee had applied at the depot, in Louisville, on Saturday morning, before the fire, and was informed by defendant that there was no cotton for them, and that the cotton was burnt on Sunday night following. The price of the cotton at Louisville and at Hartsell was shown, and plaintiff rested. Defendant offered evidence to show that the cotton in controversy was lost by an accidental fire at the company's depot in Louisville, on Sunday night, November the 9th, 1884; that said fire and destruction of said cotton was without fault or negligence on the part of defendant, and that said cotton was unloaded at Louisville, between seven o'clock and twelve o'clock Saturday morning, the day before the fire occurred, and was ready for delivery to the consignees; that notice was posted at the depot giving information to consignees of freight received. Defendant put in evidence the bill of

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lading, containing the stipulation already stated in the plea, and other provisions, that defendant should only be liable as warehouseman, after the arrival of the cotton at the depot; also, "that in the event of loss of, or damage to said bale of cotton, the loss or damage so accruing, so far as it shall fall upon the carriers, shall be computed at the value or cost of the same at the place and time of shipment under this bill of lading."

This was all the evidence. As a part of the general charge the court instructed the jury that if they found for the plaintiff, the measure of his damages was the market value of the cotton at Louisville, at the time it should have been delivered, with interest to the time of the trial. To this charge defendant excepted, and asked the court to give the following written charges: 1. "In this case, if for any reason, the consignees are not at the place to receive the cotton when unloaded from the car, and in consequence of this it is placed in the depot, the transit ceases, and the defendant will only be held to the ordinary care of warehousemen." 2. "If the jury believe the evidence they will find for the defendant." Both of these charges were refused, and defendant duly excepted, and takes this appeal, assigning for error, the charge given for plaintiff, and refusal of the court to give the charges asked by the defendant.

C. C. HARRIS and T. G. JONES, for the appellant.—1. It is the settled law in this State, as well as in Kentucky, that the common carrier may limit its common law liability by special contract. *S. & N. R. R. Co. v. Hundlin*, 52 Ala., 608; *Steele & Burgess v. Townsend*, 37 Ala., 247; *L. & N. R. R. Co. v. Brownlee*, 14 Burk., 590 (Ky. Rep.).

2. The contract limited the liability of the company, in case of loss of cotton, to its value at place and time of shipment. The charge of the court as to measure of damages—the price at Louisville—was erroneous.

3. The charge numbered 1, asked by defendant should have been given. 10 Metcalf, 472; 98 Mass., 212; 1 Gray, 263; 46 Ala., 63.

W. H. SIMPSON, *contra*.—1. A common carrier must transport goods with reasonable expedition, inform the consignee of their arrival, and afford him reasonable opportunity to remove them, *Kennedy Brothers v. Mobile and Girard Railroad Co.*, 74 Ala., 430; *Hill Manufacturing Co. v. Boston and Lowell Railroad Co.*, 104 Mass., 122.

2. To excuse himself from liability from loss by fire, within the exception in a bill of lading, the carrier must show that he used diligence, and that there was no negligence on his part.

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55 Ala., 387; 37 Ala., 247; 41 Ala., 648; *Ib.* 486; 43 Ala., 385; 53 Ala., 19; 61 Ala., 545; 75 Ala., 596.

3. Limitations or restrictions upon the liability of railroads are taken most strongly against them. 71 Ala., 616; 27 Cal., 11.

4. The railroad company was guilty of negligence in not using the fire extinguisher when the night watchman first discovered the fire "in a pile of unclaimed freight." Redfield on Carriers, 165; Story on Bailment, 601; 2 Gr. Ev., 219; Angell on Carriers, 175-81. 5. There was evidence showing negligence in the railroad company, its agents and employees; the court therefore properly refused the affirmative charge asked by defendant.

CLOPTON, J.—The defendant requested the court to instruct the jury, in substance, that if the consignees for any reason were not present to receive the cotton, when unloaded from the car, and in consequence it was placed in the depot, the transit ceased, and defendant would be held only to the care of a warehouseman. The proposition of the charge makes it incumbent on the consignee to be present, and ready to receive the freight, whenever it is taken from the car. The rule as settled in this State is, that the consignee is allowed a reasonable time to remove the goods after they arrive at the place of destination, and if not present on their arrival, the company may deposit them in its depot or warehouse for safe keeping without additional charge, until such reasonable time expires. Until the consignee has had a reasonable opportunity to remove the goods, the liability of the railroad company as a carrier continues; but on his failure to do so, the company is only responsible thereafter as a warehouseman or keeper for hire.—*Ala. & Tenn. Rivers R. R. Co. v. Kidd*, 35 Ala. 209; *S. & N. Ala. R. R. Co. v. Wood*, 66 Ala. 167; *Kennedy v. Mo. & Gir. R. R. Co.*, 74 Ala. 430; *McGuire v. L. & N. R. R. Co.* (Dec. Term 1885); 1 So. Law Times, 492. What length of time will be reasonable must of necessity depend in a great measure upon the attendant facts and circumstances, which must be submitted to the jury under proper instructions from the court. It may be generally said, that in determining what constitutes a reasonable opportunity, the convenience or necessities of the consignee will not ordinarily be taken into consideration. The question is, has suitable time been allowed to a person, living in the vicinity of the place of delivery, to remove the goods in the ordinary course and in the usual hours of business; more prompt diligence being required, if the consignee has been informed of the shipment of the goods by receipt of a duplicate bill of lading or otherwise.—Hutch. on Car., § 377.

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We presume the charge is based on a provision in the special contract, under which the cotton was shipped. It provides, that the defendant shall be liable only as warehouseman after the arrival of the cotton at the depot of delivery, and that the consignee shall receive and take it away, as soon as ready for delivery. A construction should be placed on the contract, if reasonable, which will sustain it as consonant with the law, and in so construing it, such exceptions will be construed most strongly against the defendant. It certainly is not intended, that the consignee shall take notice of the exact time of the arrival of freight, or when it is ready for delivery, and be present, prepared to receive and take it away immediately, thus requiring him to remain at the depot with means of removal, until the defendant, in the course of its business, may unload the car containing the freight, and prepare it for delivery. If the consignee has been notified, or informed in any way, when the freight will be ready for delivery, he must proceed without delay to remove it, and provide sufficient means for the purpose; but if not so notified or informed, he should be allowed suitable time, in which to ascertain the fact, which is peculiarly within the knowledge of the defendant. Without considering whether a railroad company may, by special contract, terminate its liability as a carrier at a time earlier than fixed by law for its continuance, it suffices that a provision, which terminates such liability at the time the freight is ready for delivery, on the failure of the consignee to at once receive and remove it, without notice when it would be ready for delivery, would be unjust and unreasonable. Neither by the law, nor by the contract properly construed, was the liability of the defendant converted into that of a warehouseman, on the failure of the consignees, for a sufficient reason, to be present to receive the cotton when the car was unloaded. In this case, it appears, that the cotton arrived at Louisville on the evening of the 7th of November; and if the evidence of the teamster be believed, he inquired, on the morning of the next day, for freight for the consignees of the cotton, and was informed there was none. If this be true, it was incumbent on the defendants to have corrected this mis-information, when it was discovered that cotton had arrived the previous evening consigned to them, or at least, they should be allowed a reasonable opportunity to ascertain and remove it, before the liability of the carrier could terminate.

The special contract contained a further provision, which exempted the defendant from liability for loss or damage "by fire or other casualty, while in transit, or while in depots, or places of transshipment, or at depots or landings at points of delivery." While public policy and considerations of right

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and justice forbid that the defendant may stipulate for exemption from liability for loss or injury resulting from a want of skill, or from the negligence of its agents or employees, it is well settled that the common law liability as an insurer may be limited and qualified by special contract. A carrier of goods is, by the common law, absolutely liable for safe delivery, unless prevented by the act of God, of the public enemy, or of the party complaining, and to this extent is an insurer against fire. Against this extraordinary risk he may protect himself, unless his want of skill or negligence contributed to the consumption of the goods.—*Grey v. Mo. Trade Co.*, 55 Ala. 397; *L. R. & M. Riv. & Texas Ry. v. Harper*, 44 Ark. 208; *Chi. St. L. & N. W. R. R. Co. v. Moss*, 61 Miss. 1003. If it is found that the liability of the defendant, at the time the cotton was burned, is that of a warehousman, the burden is on the plaintiff to show that the burning was in consequence of the negligence of the defendant; but if the liability as a carrier had not terminated, it is incumbent on the defendant to show, that the burning was without negligence on its part.—*East Tenn. Va. & Ga. R. R. Co. v. Johnson*, 75 Ala. 596; *L. & N. R. R. Co. v. Henlein*, 52 Ala. 606. The true interpretation of the rule is stated in *Steele & Burgess v. Townsend*, 37 Ala. 247: "The correct view is, that the loss is not brought within the exception, unless it appears to have occurred without negligence on the part of the carrier; and as it is for the carrier to bring himself within the exception, he must make at least a *prima facie* case, showing that the injury was not caused by his neglect;" and we may add, if the evidence is in equipoise, the case is not brought within the exception.

The question as to the liability of the defendant for the burning of the cotton, so far as appears, was only raised by an affirmative charge requested by the defendant. Whether the liability of the defendant as a common carrier had or not terminated is immaterial in this respect; for having protected itself against responsibility as an insurer against fire, its liability, whether as a carrier or warehousman, depends on a want of ordinary care, skill, and diligence. The defendant was bound to exercise ordinary skill and diligence in transporting the cotton, as also in providing a depository. If the defendant by the use of ordinary diligence and in the usual and regular course of its freight business could have transported the cotton to Louisville in time to have prevented its burning, or by ordinary prudence and vigilance could have avoided or extinguished the fire before the cotton was consumed, it is responsible for the loss. *L. & N. R. R. Co. v. Brownlee*, 14 Bush., 590. Not intimating an opinion as to the sufficiency of the evidence, there were facts to be inferred from it, which were material to the deci-

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sion of the case; and however slight may be the evidence, it would have been error to have given the charge, and thus withdraw the inferences from the consideration of the jury. *S. & N. Ala. R. R. Co. v. Small*, 70 Ala., 499.

It is further stipulated by the special contract, that the amount of the loss or damage, in the event the defendant is held liable, shall be computed on the value of the goods at the place and time of shipment. In *L. & N. R. R. Co. v. Henlein*, 52 Ala., 606, a stipulation, that if loss or injury should occur for which the company is liable, the amount claimed should not exceed fifty dollars for any one of the animals transported, was sustained as just and reasonable, and as the measure of the company's liability. In the same case, 55 Ala., 368, this ruling was adhered to. The stipulation was sustained on the grounds that the amount fixed was not greatly disproportionate to the real value of the animal and amount of freight charged, and was intended to adjust the measure of liability to the reduced rate of freight charged, and to protect the carrier against exaggerated or fanciful valuations. In the present case, no consideration is expressed. In the absence of evidence, a sufficient consideration will be presumed; and generally the payment of a stipulated price is a sufficient consideration to support an agreement to transport the freight on stipulated terms as to responsibility. *York Co. v. Cen. R. R. Co.* 3 Wal., 107. The common law measure of a carrier's liability is the value of the freight at the place of delivery, and at the time when it ought reasonably to have been delivered. Against this extent of liability he may not stipulate as to losses occurring by the want of due care, skill, and diligence in respect to the ordinary, usual, and general risks of the mode of transportation; but may limit the measure of his liability as to losses caused by the extraordinary risks, in respect to which he is regarded as an insurer. *Ala. G. S. R. R. Co. v. Little*, 71 Ala., 611. The stipulation of the contract limiting the measure of liability as to the value at the time and place of shipment in respect to loss occasioned by fire, does not fix the amount greatly disproportionate to the real value of the cotton at the place of destination, was probably intended to protect the company against unexpected fluctuations in the market prices, and is just and reasonable. *Harvey T. H. & Ind. R. R. Co.*, 6 Am. & Eng. R. R. Cas., 293; *Kan. C. St. Jos. & C. B. R. R. Co. v. Simpson*, 16 Am. & Eng. R. R. Cas., 158. The court erred in instructing the jury that the measure of damages is the market value of the cotton at Louisville, the place of destination.

Reversed and remanded.

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Action to Recover Penalty for Failing to Enter Satisfaction of Mortgage upon Margin of Record.

1. *Admissibility of record to show that mortgage was recorded; failure to show probate no objection to admissibility.*—In an action to recover the statutory penalty for a failure to enter satisfaction of a mortgage on the record, within three months after payment, and request in writing (Code, §§ 2222-3), the record is admissible to show the fact that the mortgage was recorded; and the failure to show its probate is no objection to the admissibility of the evidence.

2. *Permissible to show when entry of satisfaction was made.*—The record showing an entry of satisfaction, it is permissible to show that it was in fact made after the commencement of the suit.

3. *No particular form of request necessary.*—No particular form of words is necessary to constitute a sufficient request, if it informs the defendant with reasonable certainty that performance of the statutory duty is desired.

APPEAL from Montgomery City Court.

Tried before the Hon. T. M. ARRINGTON.

This was an action instituted by Julius C. Snow against V. Steiner & Bro., under sections 2222 and 2223 of the Code, to recover the statutory penalty of Steiner & Bro. for failing to enter satisfaction upon the margin of the record of a mortgage given them by the said Snow, for three months after payment, and request in writing to make such entry; and was commenced July 31st, 1885.

On the trial, the plaintiff testified in his own behalf that he had executed a mortgage to the defendants in 1883, and that he had paid it more than three months before the commencement of this suit; that said mortgage was in the possession of the defendants, and the book containing the record of said mortgage was offered in evidence. The defendants objected to the introduction of the record of the mortgage as illegal, but the court overruled the objection and the defendants excepted. The plaintiff then offered in evidence the entry on the margin of the record, which was in these words: "Satisfied July 31st, 1885; V. Steiner & Bro." which were shown to have been written there by the defendants after this suit was commenced. The defendants objected to the admission of this evidence, the court overruled the objection, and the defendants excepted.

It was further shown by the plaintiff that he had written a note to V. Steiner in March, 1885, after he had paid the mort-

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gage debt, in which he used this language: "Mr. Steiner, please cancel my mortgage," and offered evidence that it was received by said Steiner.

Upon this evidence the court charged the jury: "that if plaintiff paid the debt secured by the mortgage, and wrote a note to the defendants to cancel the mortgage, as testified by plaintiff, and said note was received by them more than three months before suit was brought, it was a sufficient request to the defendants to enter satisfaction on the record of the mortgage, if the jury believe that there was only one mortgage." To this charge the defendants excepted.

The defendants requested a number of charges, which were refused by the court. Verdict was rendered for the plaintiff, and the defendants take this appeal, assigning as error the admission of evidence objected to, the giving of the charge of the court, and the refusal to give the charges asked by the defendants.

HOLTZCLAW & WILLIAMSON, and ARRINGTON & GRAHAM, for appellants.

MOORE & FINLEY, *contra*.

CLOPTON. J.—The statutes require a mortgagee, whose mortgage has been recorded, upon payment of the amount secured thereby, and request in writing, to enter satisfaction on the margin of the record, which operates a release of such mortgage, and a bar to all actions thereon. On failure to enter satisfaction for three months after payment and request, the mortgagee forfeits to the party aggrieved the sum of two hundred dollars, unless at the time of such request or within three months thereafter, there shall be a pending suit, involving the fact of satisfaction. *Acts 1880—1, 32.* We do not understand, that the record of the mortgage was offered as proof of the execution or contents of the original. To entitle the plaintiff to a recovery of the statutory penalty, proof that the mortgage has been recorded is requisite, as unless recorded no duty to enter satisfaction arises. For this purpose, the record of the mortgage is admissible in evidence. That the probate of the mortgage does not appear, is no objection to the admissibility of the record. *Williams v. Bowdin*, 68 Ala. 126. The suit is between the mortgagor and mortgagee, and no question as to the rights of third persons can be raised. As the bill of exceptions does not purport to set out all the evidence, we must presume, that one proof of notice to produce the original, it being shown to have been in the possession of the adversary party, and of its execution, was made. Evidence

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that the record was a copy of the original mortgage was necessary to its identification, as the record on the margin of which entry of satisfaction was requested. For this purpose it was not necessary to call the subscribing witnesses. As there appeared on the margin of the record an entry of satisfaction, it was permissible to show that the entry was made after the commencement of the suit, to the end of disproving that it was a performance of the duty required by the statute.

No particular form of words is necessary to constitute a sufficient request. All that the statute requires is notice, that entry of satisfaction on the record is desired, and that the words used be such as to reasonably inform the mortgagee that performance of the statutory duty is requested. If such be its fair and reasonable meaning, and so ordinarily understood, the mortgagee must act upon it, and it is no excuse, that we did not understand it as a request under the circumstances of the case, and on the hypothesis stated in the charge of the court, the written request can not reasonably be referred to any cancellation or satisfaction, other than on the record. The charges requested by the defendant were, as an abstract proposition, calculated to mislead the jury, and properly refused. *Jordan v. Mann*, 57 Ala. 595.

Affirmed.

Stapp v. Wilkinson.

Statutory Ejectment, by Purchaser at Mortgage Sale, against Mortgagor.

1. *Documents not identified as parts of the bill of exceptions not considered.*—Written documents copied into the transcript can not be considered by this court for any purpose, unless so described and identified as to become a part of the bill of exceptions.

2. *Non-joinder of wife; when not pleadable in abatement.*—In a statutory action in the nature of ejectment, the defendant can not plead in abatement the non-joinder of his wife, since the proof of the title in her, although she was not a party, would defeat the action.

3. *Who may dispute consideration of conveyance.*—A party who does not claim under a conveyance is not precluded from disputing its consideration as recited.

4. *Destruction of deed.*—The destruction of a deed does not work a divestiture of the grantee's title.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. S. H. SPROTT.

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This action was brought by Joseph B. Wilkinson against Joseph D. Stapp, to recover the possession of certain lands, described in the complaint, with damages for their detention ; and was commenced on 15th February, 1882. The defendant filed a plea in abatement that the lands sued for were the property—the statutory separate estate of his wife, Leona Stapp, and that defendant's possession was that of trustee only, of the said Leona Stapp, and that this suit should be against her. To this plea plaintiff demurred, and the court sustained the demurrer ; to which action of the court, defendant excepted. Defendant then pleaded, "not guilty ;" upon which issue the cause was tried. The plaintiff offered in evidence a mortgage executed by defendant and others, to C. S. Harkins, as trustee for certain creditors therein named, and showed that under the power in said mortgage, the lands in controversy had been sold, and that the plaintiff was the purchaser thereof, at said sale. In this connection, the plaintiff offered in evidence the deed executed to him by said trustee in the mortgage, C. S. Harkins, showed that the defendant was in the possession of the lands sued for, and rested his case. While the record contains copies of the foregoing conveyances, *in extenso*, they do not appear in the bill of exceptions ; for which reason they were not considered by this court.

The defendant introduced a number of conveyances to show title in his wife, but the bill of exceptions did not include, or so refer to them, as to make them a part of that instrument. Joseph D. Stapp, the defendant, testified that the lands in controversy were purchased with funds of his wife, which she inherited from her father's and mother's estates ; that the original deeds were taken in her name, and that those offered in evidence were correct copies of the originals, which had been destroyed by fire in 1876, when the probate office of the county, with the records, was burned ; that no title to said lands had been vested in him since he had become indebted to any of the parties named in the mortgage ; that both the trustee, Harkins, and the creditors secured by said mortgage, had notice at the time of the execution, that he, witness, had no title to the lands therein conveyed. The defendant further testified that J. R. S. Wooldridge, being largely in debt at the close of the war, being the guardian of witness, and owing him a considerable sum, conveyed to witness, in payment of said debt, an one-half interest in the lands in controversy, known as the Wooldridge lands, and that, afterwards, said Wooldridge conveyed to him, witness, the other half interest in said lands ; that afterwards, witness reconveyed to said Wooldridge the whole of said Wooldridge tract—all of which was done before the execution, by witness, of the mortgage to Harkins, as trustee. Witness, the

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defendant, still testifying, said : "I purchased the lands described in the deed made by M. L. Stansel, from him, paid for the same with money belonging to my wife, and took the deed in her name, which deed was afterwards destroyed by fire. I got Col. Stansel to make another deed to my wife to said lands, described in the deed introduced, made by M. L. Stansel." This part of the defendant's testimony was contradicted by M. L. Stansel, who was introduced as a witness by the plaintiff, and who testified that the original deed prepared by him, was made to the defendant, J. D. Stapp, himself, and not to his wife, and that nothing was said at the time, about the lands having been paid for with his (Stapp's) wife's money ; that afterwards, J. D. Stapp came to witness, Stansel, stating that the original deed had been destroyed by fire, and requested witness to prepare another, making it to his (Stapp's) wife ; and witness, supposing that it affected no one else, after some hesitation, wrote a deed to said lands, to the wife of Stapp, which was the deed read in evidence. Defendant objected to the introduction of this evidence of M. L. Stansel, because it was an effort to alter the terms of a written deed, and because the plaintiff, not being a creditor at the time of the execution of the deed, could not inquire into its validity. Each of said objections being overruled by the court, defendant excepted. The plaintiff introduced a witness, the said Wooldridge, who testified that in 1866, being indebted to the defendant Stapp, he conveyed him all his land, one-half interest at one time, and the other half at another time ; at those dates Stapp was not married ; that afterwards, in 1868, the said Stapp reconveyed to witness one-half interest in said lands, for which he paid him nothing ; that in 1874, witness conveyed to Mrs. Leona Stapp all of said lands, for which he was paid nothing. To the introduction of this evidence defendant objected, and the court overruling the objection, the defendant excepted. There was much other evidence introduced by the defendant and by the plaintiff, tending to show title to said lands in Mrs. Leona Stapp, and in the defendant, Stapp, respectively, at the time of their conveyance to plaintiff. Thereupon the court charged the jury that if they found, from the evidence, that at the time Wooldridge conveyed said lands to Mrs. Stapp, in 1874, he only owned one-half interest therein, the title to the other half interest being in J. D. Stapp, then, as to this latter half interest, they would find for the plaintiff ; and that if the deed made by Col. M. L. Stansel to that part of the lands known as the Stansel tract, was originally made to J. D. Stapp, then as to that tract they would find for the plaintiff. To this charge the defendant excepted. The defendant asked a great number of written charges which the state of the record and opinion of this court render irrele-

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vant, and unnecessary to notice. Judgment was rendered in favor of the plaintiff, and the defendant takes this appeal.

W. F. JOHNSTON, for appellant.

E. D. WILLETT, M. L. STANSEL, LEWIS M. STONE, *contra*.

STONE, C. J.—We find, in the transcript before us, copies of many conveyances, none of which are so identified or described as to become parts of the bill of exceptions.—*Parsons v. Woodward*, 73 Ala. 340. Within this class are the following: Assignment from R. C. Long & Co. to Harkins, trustee; deed from C. S. Harkins, trustee, to Joseph B. Wilkinson; deed from M. L. Stansel to Leona Stapp; deed from Lewis M. Stone to same; deed from Wooldridge to same.

The defendant pleaded in abatement the non-joinder of his wife, Leona Stapp, as a defendant, and that the lands sued for belonged to her. The court sustained a demurrer to this plea. In this there was no error. The plaintiff's right of recovery depended on his proof of title in himself, and if he failed in that, he could not recover. If Mrs. Stapp had a title, that of itself disproved title in the plaintiff. If Stapp was in possession in virtue of his wife's title, he could have had her made a defendant with him. In any event, the plea was only a denial that plaintiff had title, and the general issue raised that question. Or, the defendant claiming that his possession was only as trustee for his wife, there was no occasion to make her a party. The trusteeship connected his possession with her title, if title she had; and proof of her title would have been a justification of his possession, and a complete defense to the action.—2 Wait Ac. & Def. 96.

The evidences of paper title being entirely stricken from this record, the only evidence we can look to is that given by the witnesses orally. Joseph D. Stapp testified that the first deeds made by Wooldridge and Stansel to him had been destroyed. This necessarily let in oral proof of their contents; and in making such proof there was no violation of any rule of evidence. It was the only method left of making such proof. And no question arises as to varying the terms of a written contract by parol proof. Nor is there anything in the objection that witnesses were allowed to contradict the consideration clauses of deeds, which expressed on their face a valuable consideration. One of the main contentions in this case was over the *bona fides* of the conveyance from Stansel to Mrs. Stapp; and the plaintiff in this suit, not claiming under that conveyance, so far as we can learn, was not precluded from contra-

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dicting the recited consideration.—*Shorter v. Sheppard*, 33 Ala. 648; 1 Greenl. Ev. § 558 *et seq.*; *Smith v. West*, 64 Ala. 34.

The main issue in the court below, as shown by this record, was, whether Stansel's original deed vested title in J. D. Stapp, which has never been divested by a conveyance from him, and whether Wooldridge's deeds conveyed the entire property to said J. D. Stapp, in the lands embraced in his deeds, while Stapp's reconveyance to him embraced only an undivided half interest. There was testimony tending to prove each of these propositions. If this testimony was believed—and the jury seems to have believed it—there was a time when J. D. Stapp held the legal title to both the Stansel and Wooldridge lands, and there is no testimony that he was ever divested of the title, except as to the half interest in the Wooldridge lands which Stapp reconveyed to him. The destruction of the deeds could work no such result.—1 Greenl. Ev. §§ 265, 568.

The charges given, and refusals to charge in reference to the proper interpretation of the mortgage, we can not consider, for the mortgage is not so made a part of the record that we can look to it. We are not able to perceive any error in any of the rulings of the Circuit Court, and the judgment is affirmed.

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Action on the Case by Landlord for Conversion of Tenant's Crop.

1. *Oral stipulation ; when admissible.*—While a written contract can not be contradicted or varied by parol evidence, it is permissible, where the writing does not purport to set out the entire contract, to show by parol other stipulations not inconsistent with those expressed.

2. *Written agreement not extended by parol.*—A tenant having given his note or written obligation for the rent, specifying a certain number of bales of cotton, it is not permissible to show by parol that he also agreed to deliver a certain quantity of cotton seed.

3. *Custom ; when cannot alter written agreement.*—The landlord, suing in case for the conversion of his tenant's crop, whereby his statutory lien was lost, can not be allowed to prove "that it was a rule or custom he had made on his plantation that he should have all the cotton seed raised on the land by his tenants"; because one man can not establish a custom, and because such evidence contradicts the terms of the note for rent, which specified that a certain number of bales of cotton should be delivered as rent.

4. *When joint action will lie ; when not.*—If the cotton was converted by the wrongful act of the tenant himself, co-operating with the other defendants, who had notice of the landlord's rights, a joint action for

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the wrongful act may be maintained against all of them; but, if the wrongful act of each was separate and distinct, a joint action can not be maintained against them.

5. *When sureties on replevy bond are jointly liable with their principal.* While the removal of the tenant's crop from the rented premises, without the consent of the landlord, and without paying the rent, is *prima facie* a wrongful act, tending to the destruction of the landlord's lien; yet it may be justified by proof of legal right or lawful excuse, as by showing that it was replevied by the tenant after attachment levied at the suit of the landlord, and after the expiration of the tenancy and the tenant's removal from the rented premises; but, if such replevy was made, not in good faith for the preservation of the cotton, but with the intention to waste and convert it, and the sureties on the bond had notice of such wrongful intent, they are liable for the conversion jointly with their principal.

APPEAL from the Circuit Court of Bullock.

Tried before the Hon. H. D. CLAYTON.

This was an action for damages brought by Thompson against appellants, and was commenced on 20th May, 1882. The facts appearing by the record are substantially: that the defendant, Powell, rented a certain tract of land from Thompson for the year, 1881, for which he executed his rent note, to deliver twenty bales of cotton to Thompson, at Fitzpatrick's station, on the 1st of October of that year; that at the end of the year, after payments made to said Thompson by Powell, on account of rent, and advances, Powell was still largely indebted to his landlord. Powell moved off appellee's premises in January, 1882, and removed a quantity of cotton, cotton seed, corn and fodder, in which he was assisted by the other defendants, some of whom were purchasers of the removed property. Before the commencement of this suit, Thompson sued out an attachment, viz: in January, 1882, and levied upon certain portions of the crops grown on the rented premises, in 1881, that had been removed. The attached property was replevied by defendant, and said attachment proceedings were afterwards, and before the commencement of this suit, quashed. The complaint sets out the facts as above stated, and claims that said Powell removed from the rented premises, the crops grown thereon in the year 1881, without paying his rent and advances, and without the consent of the landlord, the said Thompson; and that he, and the other defendants, with a knowledge of plaintiff's lien upon said crops, had converted them to their own use, and prevented plaintiff from enforcing his lien thereon. Defendants demurred to the complaint, and, among others, assigned as ground of demurrer, that the landlord could not maintain an action on the case against the tenant, and others jointly with him, for an injury done to the landlord's lien. The demurrers of defendant were overruled, and issue was joined on the plea of the general issue. The

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plaintiff, testifying in his own behalf, stated that he had rented the premises occupied by Amos Powell for the year 1881, to him, for twenty bales of cotton, for which he took said Powell's rent note; and that, at the same time, Powell orally agreed that Thompson might have the cotton seed grown on the place. Plaintiff further testified that he claimed the cotton seed "because it was a rule or custom he had made on his plantation," that he should have all the cotton seed grown on his plantation, and that this rule or custom was known to said Powell. The defendants moved to exclude the evidence of plaintiff in reference to the rule or custom on his plantation, and also his evidence as to Powell's oral agreement that he should have the cotton seed. These motions were overruled by the court and defendants excepted. Plaintiff testified that in January, 1882, he sued out an attachment against the crops grown by Powell on the rented premises and levied it on five bales of lint cotton, five stacks of fodder, three hundred and fifty bushels of corn, and about sixteen hundred bushels of cotton seed, and offered in evidence said attachment writ, with the levy endorsed thereon, and the replevy bond made by defendants; that said Powell moved off his premises at the end of the year, 1881, and that the crops levied on by said attachment had been removed without his consent and without the payment of his debt for rent and advances; that a part of these crops were put in the crib of defendant, Randle, who had hired his wagons to said Powell and that said lint cotton had been shipped to Union Springs and sold by defendant, Lassitter. Defendant Powell testified that he was not indebted to plaintiff in any sum; that he had, before the commencement of this suit, fully paid him all he ever owed him for rent and advances; that when he left plaintiff's place he carried the property which he and others had replevied, to the place to which he removed, for the better preservation of the property pending the attachment proceeding. Defendant Randle testified that he hired his wagons to his co-defendant, Powell, to remove said property which had been replevied, from the premises of plaintiff to the place to which Powell had moved; that he did not know where Powell expected or intended to carry said property; that after he was informed that the corn had been put in his, witness's, crib, he told said Powell that he would use said corn and pay for it at the termination of the pending law suit. It was admitted that both Randle and Lassitter knew that said Powell was a tenant of plaintiff in the year 1881. A number of charges were asked by plaintiff and given by the court, to which defendants severally excepted, but the opinion renders it unnecessary to set them out.

The errors assigned are based upon the action of the court

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in refusing to exclude from the jury the evidence of plaintiff in relation to the rule or custom on his place by which he was to have the cotton seed grown on it; and in refusing to exclude from the jury the evidence of plaintiff that the defendant, Amos Powell, agreed orally with plaintiff, at the time of making the written rent contract, that he, Thompson, should have the cotton seed grown on the place that year, and in giving the charges asked by plaintiff.

ARRINGTON & GRAHAM, for appellants.

NORMAN & SON, and N. B. FEAGIN, for appellees.

(No briefs came into the hands of the reporter).

SOMERVILLE, J.—The action is brought by a landlord, against his tenant and other defendants, for removing crops grown on the rented premises, with notice of the existence of the plaintiff's lien for rent and advances, and converting, or otherwise making way with such crops, so as to defeat the enforcement of the lien by the statutory remedy of attachment. The form of action is in case, and the right of recovery is based on the alleged tortious act of the defendant, by which it is claimed that the landlord has been injured, the extent of his injury being the value of his lost lien.—*Thompson v. Powell*, 77 Ala. 391. The suit, in other words, is not for the conversion or trespass involved in the act of removing the crops, but for the same consequential injury resulting therefrom in the loss or destruction of the plaintiff's lien.

It does not appear that the landlord and the tenant—here plaintiff and defendant—entered into any written contract which was intended to define fully and completely the rights and liabilities of both of the contracting parties. It is shown, however, that the tenant, Amos Powell, executed on his part a written agreement, bearing date January 22d, 1881, by which he promised to deliver to the plaintiff, at a specified time and place, twenty bales of cotton, of the average weight of five hundred pounds per bale, as a stipulated compensation for the annual rent of the land, upon which the crops in controversy were raised.

It is a settled rule of law, that where the whole of a contract has not been reduced to writing, so much of it as is separable and distinct, may be proved by oral evidence, even though contemporaneous with the writing, without infringing the principle, that such evidence is inadmissible to contradict or vary the legal effect of a written instrument.—*Huckabee v. Shepherd*, 75 Ala. 342; 1 Addison Contr. (Am. Ed.) § 243; 1 Greenl.

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Ev. § 285 *a*. Where, for example, a tenant promises in writing to pay a stipulated rent to his landlord, and so much of the contract as was intended to state the liabilities of the landlord is not reduced to writing, but was left to rest in parol, it may be shown by oral evidence that he agreed with the tenant, although contemporaneously with the execution of the tenant's rent note, to make repairs on the rented premises, or incurred other like liability.—*Vandegrift v. Abbott*, 75 Ala. 487. This rule, however, does not permit the oral contradiction of that part of the agreement which is reduced to writing, and is in itself complete. It merely authorizes a separate agreement to be established by parol, as to a matter on which the writing is silent, and which is not contradictory of its terms; and this only where the court can properly infer, from the circumstances of the case, that it was not the intention of the parties that the writing should be a complete memorial of the entire transaction between them.—Stephen on Ev. (Reynold's Ed.) p. 122.

It was not allowable, under this principle, to contradict the express terms of the defendant's written agreement by oral proof of a promise to pay more rent than that stipulated. If it were permissible to show that, in addition to the twenty bales of cotton agreed in writing to be delivered, it was orally agreed to deliver as part of the same consideration, twenty-eight hundred bushels of cotton seed, as contended, it would be quite as competent, on the same principle, to prove an oral agreement of the tenant to pay as many hundred bales of cotton. The court, in our opinion, erred in allowing this evidence to be admitted.

It was equally erroneous to allow the plaintiff to prove that "it was a rule or custom *he had made on his plantation*," that he should have all the cotton seed raised on his land by his tenants, even though this fact was known to the defendant, who was his tenant under the present contract of renting. One man alone can not establish a custom or usage. This was a mere personal mode of dealing on the part of the plaintiff, and was in no local sense a custom, because it was not general, but personal.—2 Parson's Contr. 541.

The evidence, moreover, would seem to contradict the express terms of the rent note, and was, for this reason, objectionable.—*Wilkinson v. Williamson*, 76 Ala. 163; *Barlow v. Lambert*, 28 Ala. 704. The tendency of modern authorities is strongly against the loose policy of the English courts, as manifested in their earlier decisions, admitting inconclusive facts in proof of local usage, and thereby contradicting the necessary implications of written agreements, under the pretext of annexing incidents to them.—*Thompson v. Riggs*, 5 Wall 663; *Brown v. Foster*, 113 Mass. 136; Lansan on Usages, pp. 371, 417.

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The *gravamen* of the present action, as we have said, is the consequential destruction of the plaintiff's lien by the removal and sale or consumption of the crops through the alleged unlawful act of the defendants. If this result has been produced by the joint act of the several defendants, co-operating together with a knowledge of the plaintiff's rights, and without legal excuses, they would all be liable, jointly or severally, for the injury thus done. The act of each of the wrong-doers would be regarded as the act of all, and the acts of all, in consummation of a common purpose, would be the acts of each. But, for separate and distinct wrongs, in no wise connected by the ligament of a common purpose, actual or imputed by law, the wrong-doers are liable only in separate actions, and not jointly in the same action.—*Larkins v. Eckwurzel*, 42 Ala. 322; *Barbour on Parties*, 203–205.

The removal of crops, subject to a landlord's lien, without first paying the rent or obtaining his consent, is *prima facie* a wrongful act, in effect forbidden by statute, and, if unexplained, constitutes a just ground for attachment.—Code, 1876, § 3472. It tends also to the destruction of the landlord's lien by lessening his dominion and power of supervision over property designed for the security of his rent.—*Thompson v. Powell*, 77 Ala. 391, *supra*.

The wrongfulness of such removal, however, may be rebutted by showing legal right or excuse for it. It may be justified by showing, as in this case, "that the crops have been attached by the landlord" on some statutory ground, and replevied by the execution of the requisite bond on the tenant's part, provided this be done in good faith for the preservation of the property, and not for its waste or consumption. Such replevy does not destroy either the lien of the attachment created by the levy, or that of the landlord for rent created by statute, which exists independently of the levy, and even after the dissolution of the attachment or the quashing of the writ for formal defects in its issue. But it confers on the tenant the right and makes it his duty to take proper care of the property replevied. He becomes the bailee of the sheriff for its safe custody, and for the purpose of its preservation both he and his sureties have a special property in the goods.—*Woolfolk v. Ingraham*, 53 Ala. 11; *Cordaman v. Malone*, 63 Ala. 556. The expiration of a tenant's term, and his own removal to other premises, might well justify him in removing crops replevied under attachment proceedings, in order to insure their safe custody.

If a tenant replevies such property, however, as a mode or device of obtaining possession, under color of legal authority, and with intention to sell or convert it, and not *bona fide* for the purpose of its preservation, this would be a tortious act,

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and all who co-operate in it, with knowledge of the tenant's purpose and of the landlord's rights, would be liable as co-tortfeasors.

The court, in our opinion, committed no error in admitting in evidence the bond, and other papers, executed by the parties to the suit, and relating to the subject matter of it—the replevied crops. They showed their interest in, and relation towards the property, and served to throw light upon their conduct in dealing with it subsequently. *Prima facie* these papers imputed nothing but good faith in their dealing, but this could be repelled by the facts, if deemed sufficient. The burden was on the plaintiff to show collusion on the part of the several defendants in doing some one or more wrongful acts destructive of the plaintiff's lien as landlord and in execution of a common intent to this end, each being responsible for the natural and probable consequences of his acts, or those of his co-defendants in which he co-operated by counsel or assistance.

The judgment of the Circuit Court is reversed and the cause remanded.

CLOPTON, J., not sitting.

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Final Settlement of Administration.

1. *When onus on administrator on final settlement, to show error in inventory.*—When an administrator returns in his inventory a debt due from himself to his intestate, and, on final settlement, contends that the debt was in fact paid to the intestate while living, the *onus* is on him to show that it was erroneously included in the inventory by mistake or otherwise; and in the absence of satisfactory explanation, he must be charged with the amount.

2. *When onus on distributees to disprove correctness of credit allowed on partial or annual settlement.*—A credit allowed on a partial or annual settlement being presumptively correct (Code, § 2531), the *onus* is on the distributees, on final settlement, to overcome this presumption; and in the absence of satisfactory evidence of its incorrectness, the credit must be allowed.

3. *Administrator not credited with amount advanced distributee.*—On settlement of an administrator's accounts, he can not be allowed a credit for money advanced to a distributee, but the amount may be charged against the distributee, when his distributive share has been ascertained.

4. *Confederate money; liability for; entitled to credit.*—An administrator who, during the late war, received Confederate treasury notes in

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good faith, in the course of administration, is only liable for its due and proper administration; and having exchanged for registered bonds the surplus remaining in his hands after paying off the debts, he is entitled to a credit for the amount so lost to the estate, when no fraud or collusion is charged against him, and there is no proof that he could have invested it in any other way.

5. *Administrator's debt, when he is creditor of his intestate presumed paid up on receipt of assets.*—When an administrator, being a creditor of the intestate, receives assets which he can lawfully apply to the payment of debts, he is bound to make the application, and the debt will be presumed to be paid; and if he receives depreciated currency in payment of the debts of the estate, he is required to apply it in payment of his own debt.

6. *Note for slave—chargeable with value in good money at time of sale.* For the amount of a note given for the purchase-money of a slave, sold by the administrator under an order of court, he is *prima facie* chargeable in settlement, not for the amount specified in the note, but for the value of the property in good money at the time of the sale.

APPEAL from Probate Court of Calhoun.

Tried before the Hon. ALEXANDER WOODS.

This is an appeal by Washington Dickie as administrator of the estate of E. C. Dickie, deceased, and is taken from rulings of the court upon certain items of his account upon final settlement of said estate. The character of the items, and the action upon them, sufficiently appear in the opinion rendered by this court.

CALDWELL, HAMES & CALDWELL, for appellants.

G. C. ELLIS, *contra*.

CLOPTON, J.—The evidence does not convince us, that the Probate Court erred in refusing to charge the administrator with the amount alleged to have been collected from Cochran. The witnesses contradict each other as to the collection, and there is no proof that Cochran was indebted to the estate. Nor is the evidence sufficient to relieve the administrator from liability for the pistol purchased by him. Supposition or belief, that it had been accounted for in some prior aggregate items will not answer. The fact must be made to appear with reasonable certainty.

We are unable to satisfactorily ascertain, from the record, the facts in respect to the sum of \$102.19, with which the distributees moved to charge the administrator, as a debt owing by him to the intestate. The administrator, admitting the debt originally, testified that he paid it to the decedent in his lifetime; and yet, as we understand the bill of exceptions, it was included in the inventory returned to the Probate Court in 1868, several years after the death of the intestate. Payment in the lifetime, and a verified admission of the debt

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several years after death are not reconcilable. If so returned, the administrator is *prima facie* chargeable; and the *onus* is on him to show, that it was erroneously included in the inventory, by mistake or otherwise. Without satisfactory explanation, he should be debited with the amount.

In the annual settlement of 1868, the administrator was allowed a credit of \$974.45, as disbursed in payment of a note, made by intestate and E. McClelen, payable to John B. Win, guardian. From the endorsements on the note, it appears, that McClelen, in February, 1863, paid the sum of \$590.30; and in November thereafter, the administrator paid to McClelen the sum of \$384.15, being the balance of principal and interest. The distributees moved to reduce the credit to the latter amount. What the relation was between the makers, whether of principal and surety, or of co-makers equally bound—is not shown. The credit having been allowed on an annual settlement, the presumption is in favor of its correctness—that the intestate was primarily bound, and that the administrator had refunded to McClelen the amount he had paid in satisfaction of the note. On the final settlement, the burden is on the distributees to show that the allowance is improper. The evidence set out in the record is ineffectual to overcome the presumption of correctness.

The administrator was allowed a credit for money advanced to the widow. The duty and authority of an administrator are, to receive and collect the assets of the estate, pay the debts and expenses of administration, and distribute the *residuum* among those entitled. Money, advanced to a distributee during the administration, is not money paid on account of the estate; and the allowance on his account as administrator of a credit for money so advanced, is unauthorized. Such mingling of accounts tends to produce confusion, and to render it difficult, if not impracticable, to ascertain and equalize the shares of the several distributees. The money advanced to the widow should have been disallowed as a charge against the *estate*, and charged against her distributive share, after it had been ascertained. *Willis v. Willis*, 9 Ala. 330; *Parker v. McGaha*, 11 Ala. 521.

During the early period of the administration, Confederate treasury notes constituted the circulating medium, and were employed as money in all the transactions of business. The rule settled by our decisions is, that a personal representative, who received, in the course of administration, and in good faith, Confederate money, did not commit a *devastavit*, and is only liable for its due and proper administration. A part of the Confederate money received by the administrator was used in paying the debts of the deceased, and a part was de-

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posited in the proper office to be exchanged for registered bonds bearing interest. The remainder became worthless in the hands of the administrator. The money of the estate was kept separate; no fraud or collusion is charged; and there is neither allegation nor proof, that it could have been otherwise invested. The court, under the circumstances, properly refused to disallow the credit for the amount funded. *Morris v. Morris*, 58 Ala. 443; *Cumming v. Bradley*, 57 Ala. 224; *Waring v. Lewis*, 53 Ala. 615.

When the decedent is indebted to the personal representative, and assets of the estate come to his possession, the title and ownership of which he can transfer, and which he is legally authorized to apply to the payment of the debt, it is extinguished. No delay in making the application, and no improper diversion of the assets, can defeat the satisfaction of the debt. The law regards it as paid from the time he receives such assets. *Miller v. Irby*, 63 Ala. 477; *Trimble v. Farriss*, 78 Ala. 260. Any kind of money, which the administrator receives as a valid payment of debts due the estate, will be effective for this purpose. Having the sole right and authority to manage and collect the assets of the estate by converting them into money, he will not be permitted to receive in his representative capacity a depreciated currency as money, suffer it to become worthless in his hands, devolve the loss on those, whose interests are committed to his care, prudence and management, and keep his own debt alive. Such is not a due and faithful administration of such currency. He must retain in payment of his own claim the same kind of money, which he receives in payment of demands due the estate. The court should have sustained the exception to the allowance of the debt, claimed by the administrator, as due him by the intestate.

At a sale of property of the estate, the widow purchased a negro woman, and gave her note with two sureties for the purchase money. The distributees moved to charge the administrator with the amount of this note. The administrator is *prima facie* chargeable with the sale bill. No steps were taken to collect the note, except to ask the widow a time or two if she could pay it. The excuse is, that he knew the widow could not pay it, and that he did not bring suit, because he thought it was useless to run the estate to costs. It is not shown, that the makers of the note were considered solvent, when it was accepted by the administrator; and if solvent, that the sureties on the note did not so continue a sufficient time to make a suit available. On the evidence set out in the record, the administrator is chargeable with the note. *Stewart v. Stewart*, 31 Ala. 207. He should not, however, be charged

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with the full amount of the note. The property was sold in December, 1862, the purchase money being payable twelve months after date. The reasonable inference is, from the then condition of the country, and the character of the only currency in circulation, that it was expected and understood, that the note was payable in Confederate money. In such case, the administrator only could have collected the value in good currency of the property at the time of the sale, and only with this amount should he be charged. The sum with which he may be charged should be set off against the distributive share of the widow, *pro tanto*, unless she interposes some available defense. *Whitfield v. Riddle*, 52 Ala. 467; *Acts* 1878-9, 186. Reversed and remanded.

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Bill in Equity to Declare Absolute Conveyance a Mortgage, and for Redemption.

1. *Whether conveyance absolute in form is a conditional sale or mortgage; character of evidence.*—When the controversy is whether a conveyance, absolute in form, was intended as an unconditional sale or as a mortgage, the evidence must be clear and convincing to overcome the terms of the writing; but, where the controversy is whether it was intended as a conditional sale, with a reservation of the right to repurchase, or as a mortgage, a court of equity leans to the latter construction.

2. *Same; intention of both parties must be shown.*—The concurring intention of both parties must be shown, before the transaction can be established and treated as a mortgage; and if it appears that the defendant considered and intended it as a conditional sale, though the complainant intended it as a mortgage, this does not make a “doubtful case,” nor require the court to adopt the complainant’s construction.

3. *Same; indicia of mortgage, when not conclusive.*—The fact that the negotiations between the parties originated in an application for a loan of money, is regarded as one of the principal indicia of a mortgage; but, when it is shown that the application for a loan was repeatedly declined, and, after the negotiations were broken off, the defendant’s proposal of a conditional sale was accepted, the weight of that circumstance is destroyed.

4. *Same.*—Great disparity between the price paid and the value of the property, is also one of the indicia of a mortgage; but, when it is shown that the property was not in demand at the time, its value being prospective and speculative, a subsequent advance in its value, arising from unforeseen and adventitious circumstances, cannot be considered in this connection.

5. *Bill filed with double aspect.*—If the bill alleges that the transaction was a mortgage, the complainant can obtain no relief founded on a conditional sale.

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APPEAL from the Chancery Court of Tuskaloosa.

Heard before Hon. THOMAS COBBS.

This was a bill filed by Leroy E. Douglass against Frank S. Moody and Bernhard Friedman, and sought to have declared a mortgage, a deed absolute in its terms, which the complainant and his wife had previously executed to the defendants; and was commenced on 31st May, 1881.

The complainant alleges that in June, 1880, he borrowed from the defendants five hundred dollars, two hundred and fifty dollars from each; and to secure its repayment within the stipulated time, he conveyed to them by deed his interest in certain lands in Tuskaloosa county; that he further made an independent agreement with the grantees that he would pay them a *bonus* of one hundred dollars for the use of the five hundred for ninety days; that the conveyance was in the form of an absolute deed, because the complainant believed it would be more satisfactory to the defendants than a mortgage, as the complainants had been investing the money of his wife in some of his transactions. The bill avers that the complainants wrote a letter to the defendant, Moody, a short time before the expiration of the ninety days in which the loan was to be repaid, asking an extension of the time of payment, and offered a liberal *bonus* for further indulgence; that he stated in said letter that if he failed to secure the indulgence asked he would arrange to pay the defendant, Moody, the amount due him within the ninety days, but that he received no answer to his letter; that he tendered to the defendant, Friedman, one-half of the six hundred dollars, agreed to be paid, within the ninety days, and that said Friedman refused to accept it, because the whole amount was not offered. The bill alleges that it was the intention of the parties that the deed should be only as a security for the payment of the loan made by defendants to complainant and prays that it be declared a mortgage and that complainant be permitted to redeem.

The defendants answered, admitting that the complainant applied several times to them for a loan, but that it was refused. That afterwards, complainant offered to sell, and did sell to the defendants the lands described in the deed, for the sum of five hundred dollars, which was a fair market value at the time: that they made an independent oral agreement to re-sell said landed interest to complainant, within a given time, at the price of six hundred dollars; that it was understood between all parties, at the time, that the transaction was what it purported to be, a straight-out sale. The defendants deny that the complainant wrote to Moody, asking an extension of time, nor did he offer to repurchase, according to the terms of the verbal agreement.

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On final hearing, on pleadings and proof, the chancellor rendered a decree dismissing complainant's bill. The complainant appeals from the decree and assigns the same as error.

J. M. MARTIN, PETER HAMILTON, for appellant, cited *McNeill v. Norsworthy*, 39 Ala. 159; *Turner v. Wilkinson*, 72 Ala. 361; *Mobile &c. v. Robertson*, 65 Ala. 387; *Holmes v. Grant*, 8 Paige Ch. Rep. 238; *Russell v. Southard*, 12 How. 148; *Conway's Exrs. v. Alexander*, 7 Cranch 218; *Brown v. Dewey*, 1 Sand. 71; *Eiland v. Radford* 7 Ala. 726; *Malone v. Marriott*, 64 Ala. 470-4; *Chapman v. Hughes*, 14 Ala. 220; *Chaudron v. Magee*, 8 Ala. 570; *Filton v. Fofield*, 93 U. S. 163; *West v. Hendrix*, 28 Ala. 226; *Brantley v. West*, 27 Ala. 552; *Bishop v. Bishop*, 13 Ala. 475; *Swift v. Swift*, 36 Ala. 153; *Haynie v. Robertson*, 58 Ala. 38; *Jenkins v. Harrison*, 66 Ala. 354, and *Clark v. Taylor*, 68 Ala. 454. (Head-note 7).

McEACHIN & McEACHIN; WOOD & WOOD; A. C. HARGROVE, *contra*.—Was the absolute deed a *bona fide* transaction, or was it intended by all the parties, as a mortgage in disguise? This is the paramount question at issue. The absolute deed must stand as the sole expositor of the contract, unless the complainant shows, under the most stringent rules of evidence, that a mortgage only was intended. *Peebles v. Stolla*, 57 Ala. 53; *West v. Hendrix*, 28 Ala. 226; *Logwood v. Hussey*, 60 Ala. 417; *Haynie v. Robinson*, 58 Ala. 37; *McKinstry v. Conlon*, 12 Ala. 678; *Brantley v. West*, 27 Ala. 542; *Eiland v. Radford*, 7 Ala. 724; *Bogan v. Cowart*, 21 Ala. 92; *Chapman v. Hughs*, 14 Ala. 218; *Lane v. Dickerson*, 10 Yerger 373; 1 Jones on Mortgages, §§ 266, 267; 1 Herman on Mortgages, R. E. § 150. And the proof in such a case must be clear and convincing. *Brantley v. West*, 27 Ala. 542; 1 Brickell's Digest, p. 271, sec. 318. It must be clear, consistent and convincing. *West v. Hendrix*, 28 Ala. 226. It must be strong and stringent. *Bishop v. Bishop*, 13 Ala. 475. It must not only be clear and convincing, but it must be strong and stringent. *Parks v. Parks*, 66 Ala. 326. Loose declarations will not weigh in such a case. 1 Brickell's Digest, p. 271, § 318. Casual remarks of a man about his property will not be considered in such a connection. *Bishop v. Bishop*, 13 Ala. 475. It will not be sufficient to raise a doubt or suspicion about whether or not the deed expresses the true contract of the parties. *Brantley v. West*, 27 Ala. 542. But the presumption arising from the conveyance, that it fully speaks the whole truth, must prevail until the contrary is established beyond all

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reasonable controversy. For, say the Supreme Court of the United States, in *Howland v. Blake*, 7 Otto (97 U. S.): "A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence." The complainant has no extrinsic evidence to rely on for relief. The inadequacy of price is not established, and even if it were, it could cut no figure against the positive proof as to the contract. *West v. Hendrix*, 28 Ala. 226; *Peeples v. Stolla*, 57 Ala. 53; 1 Jones on Mortgages, § 275; *Murphy v. Bradfield*, 27 Ala. 634; *Bishop v. Bishop*, 13 Ala. 475; *Brantly v. West*, 27 Ala. 542. The corroborating circumstances are all against the theory of a mortgage. There was no note or other evidence of debt existing between the parties, and, in fact, there was no debt due from complainant to respondents, which the latter could enforce against the former, or his property; and where there is no such debt, there can be no mortgage. *McKinstry v. Conly*, 12 Ala. 678; *Haynie v. Robinson*, 58 Ala. 37. "The rule is without exception," says Judge Walker, in *Swift v. Swift*, 36 Ala. 147, "that where no debt exists, a mortgage is impossible. It is a necessary ingredient of a mortgage, that the mortgagee should have a remedy against the person of the debtor. There can be no right of redemption on one side, unless there be a right of foreclosure on the other." See, also, *West v. Hendrix*, 28 Ala. 226; *Conway v. Alexander*, 7 Cranch 28; *Chapman v. Hughs*, 14 Ala. 218; *Peeples v. Stolla*, 57 Ala. 53. If there be a written defeasance accompanying an absolute deed, and it is doubtful whether this contract was intended to ingraft on the deed the properties of a conditional sale or a mortgage, a court of chancery will construe it the latter rather than the former. *McNeill v. Norsworthy*, 39 Ala. 156. But the principle extends no farther. Complainant's counsel read from the case of *Locke v. Palmer*, 26 Ala. 312, to sustain the proposition, that, in case of doubt whether a conveyance was an absolute deed or a mortgage, a court of chancery would hold it to be a mortgage. This case was well calculated to mislead, until our Supreme Court removed the difficulty. Judge Stone, in *Parish v. Gates*, 29 Ala. 254, clearly shows that the decision mentioned was perverted from its true sense and meaning, by clerical errors. Said he, "where the word 'absolute' precedes the word 'sale,' the word 'conditional' should be substituted. Parol evidence is admissible, under certain circumstances, to show that a deed absolute on its face was intended by all the contracting parties to operate as a mortgage. This is an exception to the general rule excluding parol testimony to change a written instrument, and is the limit of the exception. The Supreme Court is disposed to regret the exception rather than ex-

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tend it, said Judge Somerville in a recent case. Parol testimony is not admissible to show that an absolute deed was intended as a conditional sale. 1 Jones on Mortgages, § 227; *McKinstry v. Conly*, 12 Ala. 678. The question in this case does not arise upon the construction of a doubtful defeasance as whether a certain written instrument is a mortgage or a conditional sale; but upon a deed absolute upon its face—which may be shown to be a mortgage in disguise, by parol testimony. The problem that complainant's counsel would present, under the above principle is—not whether the contract was an absolute deed or a mortgage—as the bill of complainant presents it—but whether, if not an absolute deed, it is a mortgage or a conditional sale. This is going one step too far with parol testimony, and is entirely without the bounds of the limited exception to the general rule of evidence. *Couch v. Woodruff*, 63 Ala. 466; *Cargyle v. Rogan*, 65 Ala. 287; 1 Jones on Mortgages, § 277. The oral agreement for a resale was void under our Statute of Frauds, even if parol evidence was admissible to show that an absolute deed was intended as a conditional sale. Code of Alabama, § 2121. Respondents say that there was no technical conditional sale, but simply an oral agreement on their part to resell to complainant. “When a deed is made for a consideration paid at the time, it will not lose the character of an absolute conveyance, by an agreement on the part of the vendee to allow the vendor to repurchase at a future day.” *West v. Hendrix*, 28 Ala. 226. Even if the agreement to resell had been in writing, and contemporaneous with the absolute deed, the transaction would not have been, strictly speaking, a conditional sale, but a sale with a right to repurchase. The sale would be valid—the fee would pass—and the contract to resell would stand upon its own footing, and could be enforced by a bill for specific performance. *Peebles v. Stolla*, 57 Ala. 53; *Haynie v. Robinson*, 58 Ala. 37; *Hickman v. Cantrell*, 9 Yerger 172; *West v. Hendrix*, 28 Ala. 226; *Brantly v. West*, 27 Ala. 552; *Lane v. Dickerson*, 10 Yerger 373; *Bogan v. Cowart*, 21 Ala. 92; *Chapman v. Hughs*, 14 Ala. 218; *Logwood v. Hussey*, 60 Ala. 417. But even if the contract be held to be a conditional sale—and this the complainant does not ask, but utterly repudiates—still no relief can be granted under this aspect of the case. We say that the complainant did not comply with the terms of the oral agreement to resell. No tender was made to Moody, one of the tenants in common. The letter from Chattanooga, even if written and received, did not relieve the complainant from the necessity of a tender. Parsons on Contracts. The tender to Friedman was not good, because it was unaccompanied by a deed. *Blood v. Goodrich*, 9 Wend. 68; 1 Brickell's Digest,

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p. 311, § 69. But more especially and certainly was it not good, because Friedman and Moody were joint purchasers and tenants in common, and a tender to Friedman was not good, unless the entire amount due was offered. Freeman on Co-tenancy and Partition, 176, 177, 371-2; 2 Jones on Mortgages, 894; *Graham v. Linden*, 50 N. Y. 547; Fisher on Mortgages, 526; 1st Hilliard on Mortgages, 404; *Johnson v. Caudage*, 31 Me. 28. It is clear that under this bill, the complainant has no right to have the transaction declared a conditional sale, or a contract to resell, and have a specific performance declared. The court says, in *Swift v. Swift*, 36 Ala. 147: "The bill alleges that the contract between the parties was a mortgage, not a conditional sale; whereas it was, in fact, a conditional sale and not a mortgage. The contract proved, therefore, is not the contract alleged." *Parish v. Gates*, 29 Ala. 254, was a bill filed to have a bill of sale absolute on its face declared a mortgage—very like the bill of complaint at bar,—and the court held, Justice Stone delivering the opinion, that if the transaction was shown to be a conditional sale, the bill was not framed so as to entitle the complainant to relief. See, also, *Peeples v. Stolla*, 57 Ala. 53.

CLOPTON, J.—The bill alleges that the conveyance to the one-half interest in the lands, mentioned therein, executed by complainant to the defendants, though absolute in form, was intended as security for the payment of money, borrowed by him from them, which he agreed to pay, with the *bonus*, by September 25, 1880. The answers of the defendants deny any loan of money, or such agreement; but aver that the understanding was, that complainant should have the right to repurchase on payment of the stipulated amount within the time specified. Therefore, it is an admitted fact in the case, that the transaction was not an absolute, unconditional sale; but that, by a contemporaneous parol agreement, the deed was delivered on conditions not expressed therein, by a compliance with which the complainant had a right to re-acquire title to the lands. The point of contention is, whether the qualified right is a right of repurchase, or of redemption.

Whether a parol agreement, that the grantor shall have the right to repurchase, where the conveyance is absolute, is void under the statute of frauds, it is not necessary to consider. The question does not arise. It is well settled, that parol evidence is admissible to show, that a deed apparently absolute was intended as a mortgage. The requisite degree of proof varies as the controversy may be, whether an *unconditional* sale or a mortgage, and whether a *conditional* sale or a mortgage, was intended. In the former case, the evidence must be clear and convincing; in the latter, courts of equity are inclined to con-

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sider the transaction as a mortgage.—*Turner v. Wilkinson*, 72 Ala. 361. The complainant will be given the benefit of the rule last stated, in the consideration of the evidence. The rule, however, does not create a presumption of law, that such transaction is a mortgage, nor does it cast on defendants the burden of proving, that it is a conditional sale, as appellant's counsel insist. The extent of the rule is, when on an examination of the entire evidence, the intention of the parties remains in doubt, the court leans to the construction in favor of a mortgage, not because of any presumption of law, but on the conservative and equitable ground, that such construction will probably be less injurious in its results, and more generally promotive of the purposes of equity. The concurring intention of the parties at the time of making the transaction, determines its character; and this intention must be collected, if it reasonably can, from the attendant facts and circumstances.

The complainant alleges, that he never saw or heard of the written memorandum, which was recorded with the deed, until long after it was recorded, and the defendants had refused to allow a redemption of the lands, and that he never consented to the terms therein expressed. The defendants concede, that it did not constitute a part of a written contract, and was prepared after the delivery of the conveyance, for their private use, to preserve an accurate statement of the terms, having been recorded by inadvertence or mistake. As the memorandum was not made contemporaneously with the deed as a part of the transaction, and as complainant is not a party thereto, it is not obligatory on him, nor is it evidence against him. But if he chooses to treat it as evidence of an admission of a conditional execution of the conveyance, it must also be regarded as evidence of the terms and character of the condition, receiving the consideration, to which, in the opinion of the court, it may be entitled. The memorandum may, therefore, be eliminated from the case as a contract, or part of the transaction. If eliminated, there is no written defeasance, from which, as interpreted and illustrated by the other facts and the surrounding circumstances, the intention of the parties may be ascertained. The issue is distinctly presented, resting exclusively on parol evidence, whether the agreement was, that the deed should stand as security for the payment of money loaned, or was a mere right to repurchase; and must be determined on the evidence, as any other fact involved in a judicial investigation.

Without respect to the form, a conveyance of lands, which is intended as security for a contemporaneous loan of money, equity regards as a mortgage. The right of redemption attaches to such conveyance as an inseparable incident. To invoke the application of the doctrine, a loan and an intended

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security must be shown by sufficient evidence, though it may be circumstantial. That the transaction originated in a negotiation for a loan of money; great disparity between the value of the property and the price paid; and the continuance of a debt for which the grantor is liable, are usually regarded *criteria* of primary importance, in determining the question. Though the existence of either is a strong circumstance, the concurrence of all is not conclusive, but devolves on the grantee the burden to rebut the presumptions arising therefrom by clear and convincing evidence.—*Turner v. Wilkinson, supra*. The fact is conceded, that complainant's first proposition was for a loan of money, to be secured by a lien on the lands in controversy, which was repeated several times, and on different occasions. If the evidence of the defendants be believed, the propositions were promptly declined as often and when made; and after an interval of some days, the complainant proposed to one of the defendants to sell the lands with the right to repurchase, which offer was finally accepted, and a sale consummated. The value and weight of the circumstance, that the first propositions were for a loan, depend upon the ascertainment, whether the negotiation was continuing or had terminated, and the offer to sell became and was a separate and independent proposition, consequent on the failure to obtain a loan?

Comparing the respective versions of the parties, the defendants' appears the most natural and rational as a business transaction; considering it, as exhibited in complainants' testimony—a continuous negotiation for a loan from its inception to its consummation—the reason stated by him for giving an absolute deed is unsatisfactory. If a mortgage had been offered, and an indefeasible conveyance demanded, there would have been plausibility in his explanation, and consistency in his version of the negotiations. But without offering a mortgage, or making any inquiry, he voluntarily gave an unconditional conveyance in form, because of an alleged belief, that the defendants would not accept a mortgage, by reason of an apprehension that his wife might have some claim to the property, which was purchased by him at a register's sale, and the legal title to which was vested in him; as if the one mode of conveyance would be more effectual against a just claim of the wife than the other, each being signed by her. No evidence of a loan was taken, or requested, or offered. While a bond, bill, or note, or any written evidence of a debt is not requisite, and proof of a loan itself proves a debt, the absence of such independent evidence is a circumstance, going to show a conditional sale, and that payment is optional, the value being dependent upon its connection with the attendant facts and cir-

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cumstances.—*Mo. B. & L. Asso'n. v. Robertson*, 65 Ala. 382; *Conway v. Alexander*, 7 Cr. 218. Neither can it be said, that the necessities of the complainant put him at a disadvantage in making the transaction. It does not appear that he needed the money because of financial misfortunes and embarrassments, nor to meet urgent demands and necessities. He desired it for the purpose of making an investment in other lands, from which he anticipated a speedy and large profit.

It may be admitted that the testimony shows disparity between the value of the lands and the consideration paid. They were mineral lands, their market value dependent, in a great measure, on locality and facilities of transportation. The entire lands were offered for sale several times by the register under a decree of the Chancery Court, when no bid was obtained which he was willing to report; and when last offered in April, 1879, were purchased by the complainant and two other persons for fourteen hundred dollars. At the time of the transaction between the parties, they were not in demand; and their value was prospective. Ordinarily, only those who are financially able to wait future developments could or would purchase. In such case, the opinions of witnesses can not be weighed with nicety and exactness. The subsequent advance in value, arising from unforeseen, adventitious circumstances, has no retroactive effect on the character of a past transaction. Inadequacy of consideration, alone, is not sufficient to convert an absolute conveyance into a mortgage.—*West v. Hendrix*, 28 Ala. 226.

We will not tediously and unnecessarily extend this opinion, by reviewing all the details and circumstances disclosed by the evidence, or the subsequent conduct of the parties. The complainant stands alone, while his testimony is contradicted by both of the defendants, who are sustained by two other witnesses. Conceding that the parties stand on an equal footing as to interest, and according to all the witnesses, truthfulness and honesty of purpose, the conclusion most favorable to complainant is, that he regarded the transaction as creating a mortgage, and the defendants regarded it as a conditional sale. We have said, the *concurring* intention of all the parties determines the character of the transaction, and when ascertained, must prevail. "It is not the intention of the one party, dissociated from the intention of the other, which is to be ascertained." The mutual assent of the parties is essential to the completion of a contract. The ascertainment of different intentions and different understandings does not make a "doubtful case," in which equity will construe the transaction to be a mortgage. In *West v. Hendrix, supra*, it is said: "The fact that a party executing a conveyance, absolute in its terms, in-

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tended and considered it as a mortgage, is not sufficient to make it a mortgage. To produce that effect, such must have been the clear and certain intention and understanding of the other party likewise." If there be no concurring intention, no parol condition attaches, and in such case, the conveyance must prevail.—*Peeples v. Stolla*, 57 Ala. 53; *Mo. B. & L. Asso'n v. Robertson*, *supra*.

Upon a survey and examination of the whole evidence, we are forced to sustain the Chancellor's finding of the facts, and to hold, that the transaction is a sale with condition to repurchase. It is said, this conclusion works a hardship to complainant. If so, it is his misfortune, that he suffered his eagerness to procure money for other speculative purposes to induce him to make such transaction. Persons capable, may make their own contracts, no rule of law being violated, and arrange the terms as their real or supposed interests and convenience may suggest. It is the province and duty of courts to interpret, and not to make contracts. Much injustice and hardship would be escaped if parties would truly express in writing the terms of such contracts as the present, instead of resting their enforcement on parol evidence.—*Haynie v. Robinson*, 58 Ala. 37.

It is further urged, that should the court hold the transaction to be a conditional sale, the complainant is entitled to relief as to Friedman's interest, and half of the amount agreed to be paid on a re-purchase having been tendered to him within the stipulated time. The bill alleges, that the contract between the parties was a mortgage. On such bill, the complainant can obtain no relief founded on a conditional sale.—*Swift v. Swift*, 36 Ala. 147; *Parish v. Gates*, 29 Ala. 254.

Affirmed.

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Bill in Equity for Injunction and Appointment of Receiver.

1. *The power to appoint receivers in vacation*—Can only be exercised in a pending suit. The filing of the bill is the commencement of the suit.

2. *Appointment of receiver ; when void.*—The appointment of a receiver in vacation, before the filing of the bill, is without jurisdiction, and void.

3. *Same.*—The subsequent filing of the bill, and giving of the requisite bond by the receiver, cannot impart validity to the void act of his appointment before bill filed.

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APPEAL from Tallapoosa Chancery Court.

Heard before Hon. S. K. McSPADDEN.

The bill in this case was filed by F. M. Potts, and other creditors of H. T. Harwell, to set aside, as fraudulent, certain mortgages made by said Harwell to Gray & Knight, to his brother, Wm. O. Harwell, and to others, as being made to hinder, delay or defraud complainants and other creditors of said H. T. Harwell. The averments of the bill are numerous, but in view of the fact that the case turned mainly upon the validity of the appointment of a receiver, it is deemed unnecessary and unprofitable to set them out in detail. The bill charges that the said H. T. Harwell is in the full control of the property mortgaged by him, carrying on his business of retail liquor dealer, selling the mortgaged stock, collecting in debts and disposing of notes, accounts, &c., and prays an injunction against him and the mortgagees of his property, restraining each of them from using or disposing of any property belonging to said Harwell, or embraced in said mortgages executed by him, and prays the appointment of a receiver. The chancellor granted the injunction, and appointed a receiver. The order appointing the receiver is dated December 26th, 1885, and was made in vacation; the bill was not filed till December 28th, 1885. The appointment of the receiver was made without notice to defendants.

From the decree of the chancellor appointing the receiver, defendants appeal, and assign the same as error.

OLIVER & GARRETT, for appellants, file brief and argument to show—(1). That the chancellor was without jurisdiction to appoint a receiver in vacation, before the bill praying therefor, had been filed; and cited in support of their position: *Crowder v. Moore*, 52 Ala. pp. 220-1; High on Receivers, page 78 and notes—Waite's Actions and Defences, vol. 5, pp. 373-4; Edwards on Receivers, pp. 13-14, and pp. 356-7; Daniell's Ch. Pr. pp. 1734-5; 1 Atkyns Reports, p. 315; *Thompson v. Parker*, 68 Ala. 387. (2). That it was error in the chancellor to appoint a receiver without notice to defendants, citing: High on Receivers, pp. 113-14; *Verplanck v. Mercantile Insurance Co.*, 2 Paige 438. Refer also to: *Briarfield Iron Works v. Foster*, 54 Ala. 622.

WATTS & SON, *contra*, cited the following authorities: *Whitehead v. Morton*, 43 Miss. 523; *Baker v. Backus*, 32 Ill. 81; *Williams v. Jenkins*, 11 Ga. 595; *Jones v. Dougherty*, 10 Ga. 281; *Fairfield v. Irvine*, 3 Russ. 149; *Johns v. Johns*, 23 Ga. 31; High on Receivers, pp. 71-2; *Bloodgood v. Clark*, 4 Paige, 574; *Ex parte Walker*, 25 Ala 81-101.

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CLOPTON, J.—The order appointing the receiver, from which the appeal is taken, was made December 26, 1885, by the chancellor in vacation, and the bill was filed on the 28th, two days thereafter. As receivers are, ordinarily, appointed without requiring a bond from the party applying for such appointment, the courts have generally realized the necessity and duty of exercising great caution and circumspection. The bill is defective in some material respects. Whilst averring the conclusion of fraud, it does not sufficiently allege the facts, from which the conclusion arises, either by assailing the *bona fides* of the indebtedness secured by the mortgages, or otherwise; and does not charge, that the grantees had notice of the fraudulent intent imputed to the grantor. As these defects may be cured by amendment we do not propose to consider on this appeal, whether the case made by the bill, if it were properly amended, would be sufficient to require or justify the appointment of a receiver. Such consideration will be premature, until the bill is perfected, and the parties have had an opportunity of being heard.

The statute confers on the chancellor the power to appoint receivers. The application must be in writing; and when made in vacation, reasonable notice of the time, and the person to whom it will be submitted, must be given, or a good reason shown for the failure to give the same. *Code*, § 3881. Without discussing whether the facts stated in the bill, which was verified, show a sufficient reason for the failure to give notice, the question being now immaterial, it is evident that the power to appoint receivers in vacation can only be exercised in a pending suit. The filing of the bill is the commencement of the suit. *Code*, § 3759. There was no suit pending at the time the order appointing the receiver was made; and the chancellor was without jurisdiction. The direct question was decided adversely to the power of the chancellor in *Crowder v. Moore*, 52 Ala., 220; *Ex parte Whitfield*, 2 Atk. 315; *High on Recs.*, § 17. It is urged, however, that as the order was made, and the receiver qualified by giving the requisite bond on the day the bill was filed, the order should be allowed to have effect as of that date. As the chancellor was without jurisdiction, the order is void. It did not constitute a foundation on which to predicate any proceedings, and the subsequent filing of the bill did not impart to it any effect or validity.

Reversed and remanded.

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Ala. Great Southern Railroad Co. v. McAlpine & Co.

Action against Railroad Company for killing Stock.

1. *Cross appeals in action at law.*—In an action at law, where each party appeals and assigns errors, the judgment must be either affirmed or reversed as a whole; and if reversed on either appeal, it must be reversed entirely.

Charge to jury as to evidence on question of negligence.—In an action against a railroad company to recover damages for killing stock, where the court has properly charged the jury that, if they believe the evidence, they must find for the plaintiff, it is not error to further instruct them “that if, under the facts and circumstances shown in evidence, they did not believe the evidence offered by the defendant, tending to acquit itself of negligence, then a verdict may be found for the plaintiff.” This is but the legal and logical result in every case, where the party upon whom rests the burden of proof attempts to sustain it by evidence that is not believed.

3. *Liability of railroad company for injuries to stock or cattle.*—In an action against a railroad company to recover damages for injuries to cattle at or near a public road crossing (Code, §§ 1699, 1700), proof of injury raises the presumption of negligence, and casts on the defendant the burden of disproving it; and it is not disproved until all negligence is negated, and a compliance with all statutory requirements is shown, or it is shown that a compliance was impossible, or would have been unavailing. (Explaining and limiting expressions in *M. & A. Railroad Co. v. Williams*, 53 Ala. 595; and *Clements v. E. T. V. & Ga. Railroad Co.*, 77 Ala. 533, as to which the court adds, “We do not hold ourselves committed to an extreme interpretation of either of those cases.”)

APPEAL from the Circuit Court of Greene.

Tried before the Hon. S. H. SPROTT.

On the trial of this cause the plaintiffs introduced evidence to show that on or about the 26th day of November, 1881, they had a mare killed by the train on the Ala. Great Southern Railway about a half mile south-west of Boligee in Greene county; that the mare was worth from sixty-five to seventy dollars, and that she was killed by the negligence of the defendant. The plaintiffs also introduced proof that on or about the 4th day of November, 1881, the agents of the defendant corporation had, by their negligence, run a train of cars over a mule of the plaintiffs, near Boligee, Greene county, causing its death, and that the mule was worth about \$120.00. The defendant introduced evidence to show that the killing in each instance was without fault or negligence on the part of the defendant.

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As to the mare, the court, at the request of the defendant gave the charge, that if the jury believed the evidence their verdict, so far as the mare is concerned, should be for the defendant. The plaintiffs asked the written charge, which was, in substance, that the jury were not obliged to find for the defendants at all events, but only in the event they believed the evidence; and that if they did not believe the evidence tending to acquit the defendant of negligence, then a verdict might be found for the plaintiff, as to the mare. To the giving of this latter charge the defendant excepted, and assigns the same as error in the appeal taken by the defendant. As to the mule, the court gave the charge, at the request of the defendant, "If the jury believe the evidence in this cause in regard to the killing of said mule, then, in so far as said mule is concerned, their verdict should be for the defendant." To this charge the plaintiffs excepted, and asked the following written charges: 1. "Charge the jury that by the laws of this State it is the duty of the engineer or other person having the control of the running of a locomotive on any railroad in this State, to blow the whistle or ring the bell at least one-fourth of a mile before reaching any public road-crossing, or any regular depot or stopping place on such road, and continue to blow such whistle or ring such bell, at intervals, until he passes such road crossing, and until he reaches such depot or stopping place; and such railroad company is liable for all damages done to stock resulting from a failure to comply with these requirements, and if in this case the mule was killed about 384 yards from the public road crossing, and regular depot and stopping place at Boligee, then the burden of proof is on the defendant to show, that the requirements above stated, were complied with, at the time and place, when and where the injury was done; and if the jury believe from the evidence that said requirements were not so complied with, and if they further believe, from the evidence, that a compliance therewith would have prevented the injury, then the plaintiff is entitled to recover as to the mule."

2. "Charge the jury that if the mule was killed 384 yards south-west of Boligee Depot, and the public road crossing at that place, and the whistle was blown 794 yards south-west of said depot and stopping place, by giving one long blast, and, in connection therewith three short blasts of the whistle, and that the length of such blasts was such that the train did not run more than fifty yards while the same was being given, and that there was no other blowing of the whistle or ringing of the bell until after the mule had been struck, then there was a failure to comply with the statute which requires the engineer or other person having the control of the running of a locomotive to blow the whistle or ring the bell at least one-fourth of a mile before reaching any public road-crossing, or any regular depot or stopping place on such road, and continue to blow such whistle or ring such bell, at intervals, until he passes such road crossing, and until he reaches such depot or stopping place; and such railroad company is liable for all damages done to stock resulting from a failure to comply with these requirements, and if in this case the mule was killed about 384 yards from the public road crossing, and regular depot and stopping place at Boligee, then the burden of proof is on the defendant to show, that the requirements above stated, were complied with, at the time and place, when and where the injury was done; and if the jury believe from the evidence that said requirements were not so complied with, and if they further believe, from the evidence, that a compliance therewith would have prevented the injury, then the plaintiff is entitled to recover as to the mule."

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tive, on any railroad in this State, to blow the whistle or ring the bell at least one fourth of a mile before reaching any public road crossing, or any regular depot or stopping place on such road, and continue to blow such whistle or ring such bell, at intervals, until he passes such road crossing, and until he reaches such depot or stopping place; and it is for the jury to determine from the evidence whether or not a compliance with said statute requirements would have frightened the mule away and prevented the injury, then they would be authorized to find for the plaintiffs, as to the mule."

3. "If the jury believe from the evidence that a strict compliance with the law requiring the ringing of the bell or blowing of the whistle at least one-fourth of a mile before reaching a public road crossing, depot or stopping place, would have prevented the injury to the mule in question, and that such injury resulted from a failure to comply with said law, then they would be justified in finding for the plaintiffs in reference to the mule."

4. Asked the court to charge the law as laid down in the case of *M. & O. R. R. Co. v. Williams*, 53 Ala. Rep. p. 599, in reference to the statutes of this State regulating the liabilities of railroad companies for injuries to stock, the charge quoting from that case. The court separately refused to give each of said charges and the plaintiffs severally excepted.

H. M. JUDGE, and JAS. B. HEAD, for McAlpine & Co.

SAM'L. F. RICE, and WOOD & WOOD, for Ala. G. S. R. R. Co.

STONE, C. J.—This was an action on the case brought by McAlpine & Co. against the railroad company, and alleges that by two separate acts of negligence, and at different times, the railroad corporation killed a mare and a mule, the property of plaintiffs. The record and recovery show that the plaintiffs recovered damages for the loss of the mare, and failed to recover for the loss of the mule. Each party has taken an appeal, and each assigns errors. Both issues being presented in one suit, and there being but one judgment and verdict, that judgment can not be both affirmed and reversed. If reversed on either appeal, it will be reversed throughout, and tried anew; for two judgments can not be rendered in this one suit. We will first consider the railroad's appeal, which questions the recovery for the loss of the mare.

The jury was instructed to find for the defendant as to the mare, if they believed the evidence. That the mare was killed by the defendant's train all the testimony tended to prove, and

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does not appear to have been controverted. The question was then raised whether such killing was without negligence on the part of the railroad company, and on this issue the burden was on the defendant to disprove negligence. The charge given was not an instruction to find for the defendant in any event. It would have been error if given in that form; for the credibility of oral testimony must always be left to the jury. The general charge given left that question, and rightly left it, to the jury. Hence it was not error to instruct the jury that if "under the facts and circumstances shown in evidence (they did not) believe the evidence offered by the defendant tending to acquit itself of negligence, then a verdict may be found as to the mare for the plaintiff." Such is the legal and logical result in every case, where the party on whom the burden of proof rests, attempts to sustain it by testimony that is not believed. In this connection, however, we re-affirm what we said as to the duty of juries in this case when formerly here—75 Ala. 115—and *E. T. Va. & Ga. R. R. Co. v. Bayliss*, *Ib.* 466; s. c., 77 Ala. 429.

There was a failure on the part of plaintiffs to recover for the mule sued for, and from that judgment they have also appealed. The facts in reference to the killing of the mule are different, and the question of the liability of the railroad rests on somewhat different principles. This killing was done in less than a quarter of a mile of the depot and road-crossing at Boligee and hence within the area where the statute requires of approaching trains on railroads that the whistle be blown, or bell sounded, at intervals, until the train passes the road-crossing, or reaches the stopping place. We have several times held, that the measure of liability, when cattle or stock is the subject of the injury, is different from the rule when the injury is to the person. The statute—Code of 1876, § 1700—expresses the difference. We commented somewhat on this difference in *M. & M. Railway Co. v. Blakely*, 59 Ala. 471; and *Clements v. E. T. Va. & Ga. R. R. Co.*, 77 Ala. 533.

Our utterances on the subject we have in hand have not always been as guarded as perhaps they should have been. We refer specially to *M. & O. R. R. Co. v. Williams*, 53 Ala. 595; and *Clements v. E. T. Va. & Ga. R. R. Co.*, 77 Ala. 533. In neither of these cases was the question presented of a failure to comply with the requirements of §§ 1699–1700 of the Code, where injury to stock was the subject of complaint. The first of the cases presented only the question of the burden of proof, for there was no proof of any circumstance attending the killing. The testimony showed the naked fact that the cattle were injured by the railroad's train, and the court ruled that the burden was thereby shifted on the railroad company

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to disprove negligence on its part. It offered no proof, and of course, the presumption of negligence remained un rebutted. Anything said beyond this, was not called for by any testimony in the cause.

In *Clements v. E. T. Va. & Ga. R. R. Co.*, *supra*, the injury complained of was to the person. No question could arise as to the requisites of proof, when injury to cattle or stock is the complaint. The difference in the two rules was stated, following what had been said in *Williams' Case*; but the wants of the case did not call for it. We do not hold ourselves committed to an extreme interpretation of either of those cases.

The true rule—the one it is our intention to be governed by—is that laid down in this case when last before us, 75 Ala. 113. True, the statute, Code, § 1700, declares that “where any stock is killed or injured, or other property damaged or destroyed by the locomotive or cars of any railroad, the burden of proof in any suit brought therefor is on the railroad company, to show that the requirements of the preceding section were complied with at the time and place when and where the injury was done.” This is an emphatic declaration of the rule as to the burden of proof in all such cases, and the extent of it. It must be observed in its strictness and entirety, wherever there is a reasonable hope or reasonable possibility that damage or danger may be averted. It requires no attempt of the impossible. And the same section of the Code—1700—declares the consequences of its non-observance. The “railroad company is liable for all damages done to persons, stock, or other property, resulting from a failure to comply with the requirements of the preceding section, or any negligence on the part of the company or its agents.” To sum up: Injury raises the presumption of negligence, and casts on the railroad the burden of disproving it. It is not disproved until all negligence is negatived, and a compliance with all the requirements of the statute is proved, unless it is shown that the conditions were such that compliance was impossible, or would have been unavailing.—*S. & N. Ala. R. R. Co. v. Thompson*, 62 Ala. 494; *Id. v. Williams*, 65 Ala. 74; *E. T. Va. & Ga. R. R. Co. v. Bayliss*, 74 Ala. 150.

As the record formerly appeared, we considered the testimony, if believed, established the proposition that the whistle was properly blown more than a quarter of a mile before reaching Boligee station and the crossing, and that the bell was kept ringing, at intervals, until the depot was reached. We still understand the testimony of the engineer and fireman to affirm that the whistle was sounded a full quarter of a mile before reaching Boligee, that it was given by one long, followed by

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three short blasts, and that shortly afterwards the bell was sounded, and the ringing kept up until the station was reached. If this be so, no blame can attach to the railroad corporation on this account. It was not necessary the bell should have been struck instantly on the cessation of the whistle. "At intervals," is the language of the statute. If within a reasonable time after the whistle ceased to sound, the ringing of the bell commenced, and was kept up at intervals, this met the requirement of the statute.

The only new testimony found in this record is that of Dr. Byrd. It does not vary the case, under the rules of law declared above. If the testimony was believed, it showed a compliance with the statutory requirements, and disproved all negligence on the part of the railroad's employees. It went further, and, if true, no human foresight or precaution could have foreseen or prevented the injury complained of. The Circuit Court did not err in giving the general charge, nor in refusing the charges asked.

There is no error prejudicial to J. A. McAlpine & Co., and the judgment of the Circuit Court is in all things affirmed.

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Bill in Equity by Pledgor, for Account of Stock Transferred as Collateral Security.

1. *Pledge as collateral security; limitation of right to redeem.*—By an ancient rule of law, as laid down in old text-books and adjudged cases, if no time was fixed by the parties themselves for the redemption of a pledge, the pledgor was allowed his life-time within which to redeem, unless quickened by notice, or through the intervention of a court of equity; but the more modern, and the better rule, by analogy to that which applies to the redemption of mortgages, exacts of him the exercise of reasonable diligence, at the risk of being barred of all relief on account of the staleness of the demand.

2. *Same; staleness of demand.*—In the application of the doctrine of staleness, a defense peculiar to courts of equity, the tendency of modern decisions is to shorten the period allowed for the assertion of equitable rights, though each case is somewhat dependent upon its own peculiar facts and circumstances; and where the pledgor of stocks seeks, by his bill to redeem, to make profit out of an unexpected rise, a shorter period is allowed, than where he seeks to make the pledgee account on'y for a surplus received on an ordinary sale.

3. *Same; case at bar.*—In this case, the alleged pledge of stock in a private land company was made in 1871; the pledgee advanced money, from time to time, on the faith of it, "carrying it" for the pledgor during a series of years, while its value was fluctuating, sometimes worth

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only twenty cents on the dollar, and never more than the amount advanced on it; and he finally sold it 1881, when it approximated par value, for less than the amount advanced on it up to that time. *Held*, That a bill filed in 1884, and seeking to hold the pledgee accountable for the value as rapidly appreciated after the sale, until it was worth twenty for one, was properly dismissed, on account of the staleness of the demand.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 7th July, 1884, by James N. Gilmer, against Josiah Morris and the firm of J. Morris & Co., but afterwards amended so as to proceed against said Morris alone; and sought an account and redemption of sixty shares of stock in the Elyton Land Company, a private corporation, alleged to have been pledged and transferred by complainant to said Morris, on the 30th March, 1875 (as alleged in the original bill; in December, 1871, as alleged in the amended bill), as collateral security for an existing debt, and afterwards held by agreement for additional advances made on the faith of it. The transfer of the stock was in the following words: "For value received I hereby sell, transfer and assign to Josiah Morris the shares within mentioned, and authorize Josiah Morris to make the necessary transfer on the books of the company. [Signed] J. N. Gilmer. In presence of F. M. Gilmer, Jr., March 30th, 1875." The bill avers that notwithstanding the transfer is absolute in form, it was understood and agreed at the time between the complainant and Morris that the latter should hold the stock in trust and as collateral security for an indebtedness of three thousand dollars which complainant's firm of Gilmer & Donaldson then owed to the partnership of Josiah Morris & Co., of which said Morris was the senior member; that the first intimation complainant had that Morris denied that he held said stock in trust, and claimed it as his own, was about three months before the filing of this bill, when complainant called on Morris for a settlement and was informed that the stock had been sold, and the right of complainant to the stock denied. The bill further avers that Morris had received dividends on said stock sufficient to pay off the debt for which it was pledged, with the interest thereon; prays a decree declaring said transfer of stock was made in trust and as collateral security, and that an account be had of the dividends paid, applying the same to the payment of said indebtedness and the balance to be paid to complainant; that Josiah Morris be required to transfer the stock claimed to complainant, and for general relief.

Respondent Morris, after demurring to the bill for staleness, and on the ground that complainant was barred by the stat-

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nte of limitation of six years, answered, averring that on the 30th December, 1871, a certificate for sixty shares of the Elyton Land Company stock was issued to complainant, but delivered to the said Morris, and was immediately transferred by endorsement to Morris by complainant; that this was done for the benefit of complainant's father, F. M. Gilmer, who, by reason of his official position as president of the South and North Ala. R. R., and individual financial condition, requested that the stock be issued in the name of complainant; that Morris agreed to pay for the stock and carry it for F. M. Gilmer; that complainant immediately transferred the stock by endorsement to the respondent, Morris, who held it until March 30th, 1875, when this certificate was surrendered and a new certificate for the same amount was issued therefor to, and in the name of, Josiah Morris, who held it until April, 1881, when he sold it. Respondent avers that it was agreed between the said F. M. Gilmer and respondent that respondent should hold the stock as security for the payment of its price, which was paid to the Elyton Land Company by Morris, and for a previous indebtedness of said F. M. Gilmer to respondent, amounting to about two thousand dollars, with the privilege in Morris to sell the stock at any time. Evidence was offered by complainant to show that Morris held the stock as a pledge and disposed of it without authority. Morris sought to show that complainant never owned the stock at any time; that F. M. Gilmer had been offered the option of paying for it, but had not done so, and that he considered and disposed of the stock as his own, in payment of what the Gilmers owed him. On the hearing the complainant's bill was dismissed as barred by lapse of time, from which action of the chancellor this appeal is taken.

DAVID CLOPTON, GUNTER & BLAKEY, for appellant.

TROY, TOMPKINS & LONDON, WATTS & SON, *contra*.

SOMERVILLE, J.—The view of this bill most favorable to complainant is that of one filed for the purpose of redeeming certain shares of corporate stock alleged to have been deposited with the defendant by way of pledge or collateral security; or, more accurately speaking, to hold the defendant liable for the appreciated value of the stock, upon the ground that he had sold it without authority and without any notice to the complainant, who claims to be the owner and the pledgor. It is very questionable, however, whether the allegations of the bill will bear this construction, if subjected to proper criticism, and construed with requisite strictness against the pleader. The deposit of stock is averred and proved to have been made

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in the early part of the year 1871. The bill was filed on the seventh day of July, in the year 1884, or more than thirteen years after the original deposit. There is neither averment nor satisfactory proof of any recognition, on the defendant Morris' part, of any existing trust relationship between himself and the complainant intermediate between the time of the original transaction and the filing of the bill. In the year 1881, the defendant sold the stock in controversy, it being then of less value than the amount of his pecuniary demands claimed to be secured by it. After that time it appreciated rapidly in value, and is shown by the evidence to have reached eight times its *par* value.

The bill was, on the hearing of the cause, dismissed by the chancellor as barred by lapse of time, and the complainant brings this appeal.

It is our opinion, after a very careful consideration of the law and facts of the case, that the bill was wanting in equity as an attempt to enforce a stale demand, and that the decree was free from error. Considering the transaction, in the first place, as a mere ordinary pledge of stock, rather than as partaking of the nature of both a pledge and a mortgage, as it may well be construed to be, we nevertheless deem the complainant's right of redemption to be barred by the lapse of time.

It is true that we find the rule declared in the old books, and reiterated in many adjudged cases, ancient and modern, that if no time of redemption is fixed by the parties, the pledgor has his lifetime within which to redeem, unless quickened by notice, or through the intervention of a court of equity. This principle, however, is not in harmony with the more modern, and as we consider, the sounder and better rule, which is to exact of all claimants in cases of this character, analogously to the redemption of mortgages, the exercise of reasonable diligence in the enforcement of their equitable demands, at the risk of being debarred of all relief. It may be, as often said in the text-books, that, strictly speaking, the statute of limitations does not run against a pledgor, in an ordinary case of pledge, unless there is shown to be an adverse possession by the pledgee, brought home to the knowledge or notice of the pledgor. But staleness of demand, which is a defense peculiar to courts of equity, rests on another, though no doubt analogous principle, which is to visit on one, who sleeps on his rights, the fruits of his own negligence and infirmity of purpose. 2 Story's Eq. Jur. § 1884. The doctrine of staleness may properly be said to be "founded in its origin upon a sound public policy, which has a just regard for the preservation of the peace of society. It is of the utmost moment that there

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should be some end to law suits, an unreasonable encouragement of which is disastrous to the welfare of any government. Hence, reasonable diligence in the assertion of one's rights in the courts is properly exacted, not less than the exercise of conscience and good faith."—*Nettles v. Nettles*, 67 Ala. 599.

The growing importance of trade and commerce, with the increase of the means of rapid transit and speedy communication, have tended in modern times to shorten the period allowed by courts of equity beyond which a demand is considered stale on the ground of *laches*. The common law is no rigid system of unbending iron rules, but the elasticity of its principles is daily yielding to the growing wants of an advancing civilization. A rule of absolute repose has accordingly been adopted, in comparatively modern times, which is applicable to all human transactions open to judicial investigation, and by common consent, is fixed at a period of twenty years.—*Garrett v. Garrett*, 69 Ala. 429. The doctrine of staleness accommodates this rule to the equities of each particular case. If it were otherwise, the numberless mercantile and other transactions of our populous towns and cities would, in due course of time, oppress the courts with a burden of litigation which they would be incapable of enduring. No sound reason is perceived why the redemption of pledges should constitute an exception to this salutary principle. There is nothing in the relation of pledgor and pledgee which makes an invasion of the general rule, as applicable to them, either proper or desirable. And such, in our judgment, is the current of authority among the law writers, and especially the more recent ones. We accordingly find in Story on Bailments the principle asserted, that while prescription or the statute of limitations does not run against a pledgor's right of redemption, yet that "after a long lapse of time, if no claim for redemption is made, the right will be deemed to be extinguished, and the property will be held to belong absolutely to the pawnee." "Under such circumstances," it is added, "a court of equity will decline to entertain any suit for the purpose of redemption. A like rule is adopted in the common law in cases of mortgages."—Story on Bailments (8th ed.), § 346. So in the recent treatise of Mr. Schouler on Bailments, after asserting that modern prescription, as applicable to pledges, runs rather by lapse of years than the uncertain span of human life, and that "time puts an absolute barrier to the pursuit of all such remedies, irrespective of the living or dead," the author further observes: "Strictly speaking, the statute of limitations does not run against a pledge; but, inasmuch as it runs against the pledgee's enforcement of the secured debt or engagement, so will equity decline to entertain the pledgor's bill for redemp-

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tion if he or his representative bring it unreasonably late; for the property will then be conclusively presumed to have vested in the pledgee."—Schouler's Bailments, 225. The same principle is recognized by other authorities, in language but slightly different.—Wood on Lim. Actions, p. 54, § 22; *McClenney v. McClenney*, 49 Amer. Dec. 738; *Whelan v. Whelan*, 26 Ohio St. 131; Colebroke on Coll. Securities, § 132. In *White Mountain R. R. Co. v. Iron Co.* 50 Vt. 57, the reason for extinguishing the pledgor's right to redeem, in such cases, seems to have been placed on the theory that an unreasonable delay in asserting it "raises the presumption that the pledgor has relinquished his title in satisfaction of the debt." Another, and perhaps equally good reason is, the running of the statute of limitations against the pledgee operating to bar the enforcement of his debt against the pledgor personally.—Schouler's Bailments, 224–225. This is upon the principle that courts of conscience favor the feature of reciprocity in its enforcement of equitable rights.

What lapse of time shall be regarded as rendering a pledgor's right of redemption stale can not of course be formulated into any fixed rule applicable to all cases. Each case must necessarily depend upon its own circumstances, having regard not alone to the mere question of time, but also to the circumstances and relative situation of the parties, the nature of the property pledged, whether stationary or fluctuating in value, and other facts affecting the justness or equity of the right asserted. It is, therefore, as said by Mr. Schouler, "largely a matter of judicial discretion." Schouler's Bailments, 225, note 2. It is not questioned, so far as we know, by any authority, that the pledgor may always claim at least the period of six years, or the full period of time during which the pledgor is permitted to sue upon his secured debt or engagement. In *Humphries v. Terrell*, 1 Ala. 650, it was held, that the right of both a pledgor and of a mortgagor to redeem personal property would be barred in six years; and the plea of the statute of limitations of six years in that case was held good as a bar to the pledgor's right to redeem, without any positive evidence of an adverse possession. There is other respectable authority for the same view. But this case, in the phase of it now under consideration, does not necessarily require that we should carry the rule to this extent. The case of a mere pledgee, it is apprehended, is different, in some material aspects, from that of a mortgagee in possession, in whose favor the statute of limitations commences to run from the law day of the mortgage, because of his presumed adverse holding from that time. *Byrd v. McDaniel*, 33 Ala. 18; *McCoy v. Gentry*, 73 Ala. 105. All that we need say on this particular phase of

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the case is, that the pledgor will be barred by delaying for an unreasonable length of time, which must be determined by the varying facts and equities of each particular case. In *Waterman v. Brown*, 31 Penn. St. 161, the court refuses to grant relief, on a bill filed for the redemption of certain shares of bank stock, after the lapse of eleven years, the stock having in the meanwhile risen in value. The court, adopting the rule announced in *Humphries v. Terrell*, *supra*, held that the plaintiff's equity was barred by a delay of six years after the debt fell due, a demand for the debt being presumed to have been made in a reasonable time. The stock there in controversy, as here, had been transferred to the defendant, and having remained for a long time of less value than the amount of the secured debt, it was deemed to have been abandoned in satisfaction of it by mutual acquiescence. "We should administer equity very badly," said Lowrie, C. J., "if we should allow the plaintiff to treat the stock as the defendant's for so long a period, and the debt as paid by it, and then to claim the benefit of a rise in value occasioned by no merit of his." So in *Roberts v. Sykes*, 30 Barb. (N. Y.) 173, it was held that a bill to redeem certain pledged stocks, which had been transferred to the pledgee, on the books of the company, must be within ten years from the time the secured debt became due, by analogy, no doubt, to the statute of limitations governing claims to personal property in courts of law.

It is well settled that a much shorter time will be allowed the pledgor within which to exercise the right of redemption where he seeks to make a profit out of the unexpected rise in the value of pledged stocks, than where he seeks merely to compel the pledgee to account for a surplus received by him from the sale of the stocks in ordinary cases. Schouler's Bailments, 225. The case of *Hancock v. Franklin Ins. Co.*, 114 Mass. 155, cited and relied on by appellant's counsel, was obviously a case of the latter kind, and was determined, strictly speaking, rather on the ground of the statute of limitations than upon any alleged staleness of the demand. This rule of redemption is clearly analogous to the one which requires the exercise of any similar option in property, real or personal, to be put in action with reasonable diligence. There is something in the nature of fluctuating stocks which makes the principle especially just when applied to them. As said by Mr. Justice MILLER, in a recent case, decided by the Supreme Court of the United States, "the injustice is obvious of permitting one, holding the right to assert an ownership in such property, to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit." *Twin-Lick Oil Co. v. Mar-*

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bury, 91 U. S. 587. The court observed further that while a different rule would apply to property not subject to rapid fluctuations in value, yet, where property is of this character, courts require "prompt action in all who hold an option, whether they will share its risks, or stand clear of them."

These observations apply with great force to this case. The stock in question is shown, at one time during the period it was pledged, to have been worth as little as twenty cents on the dollar. At the time of its sale by the defendant it was not above *par*. When the bill was filed it had rapidly increased in value, and during the progress of the cause reached about eight times its *par* value, or nearly forty times the lowest rate to which it had once fallen. It is manifest that, in cases like this, justice can be administered only by curtailing the period allowed for exercising the option of redeeming within bounds which reasonably conform it to the equities of the peculiar emergency.

Upon this state of facts we hold that the complainant's right of redemption was a stale demand, and must be deemed to have been barred by unreasonable delay in its assertion. Sleeping on his rights for so great a length of time constitutes a degree of *laches* now fatal to their enforcement.

There is another analogous view of this case, incidentally adverted to by us above, and which is equally fatal to the maintenance of the bill. It is the defense of the statute of limitations of six years, the ground upon which the case was decided by the Chancellor.

The transfer of the stock in controversy is something more than a mere pledge. It partakes of the nature of both a pledge and a mortgage, because the transferee holds both the possession and the title of the thing transferred. The chief difference between a pledge and a mortgage is, that in the former possession is transferred, and in the latter title, usually unaccompanied by possession. No reason is perceived why the two forms of security may not be combined in one as is here done. *Casey v. Cavoroe*, 96 U. S. 467, 477. In *Nabring v. Bank of Mobile*, 58 Ala. 204, it was said, *arguendo*, that a transfer of stock, like that in the present case, was rather a pledge than a mortgage, following the view expressed in *Wilson v. Little*, 2 N. Y. 442. But the decision of this point was a *dictum*, in as much as it was immaterial and unnecessary, the same result following whether the transfer was construed to be the one or the other. In this aspect of the law, to which I am not averse, there can be no room for disputation as to the fact that the case made by the bill was barred in six years from the day of forfeiture, there being no proof of any recognition of the complainant's title within this period, and

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therefore a presumed adverse holding by the defendant. *Byrd v. McDaniel*, 33 Ala. 18; *Humphries v. Terrell*, 1 Ala. 650; *Waterman v. Brown*, 31 Penn. St. 161, *supra*; Jones on Chat. Mort. §§ 771-772.

The bill was properly dismissed, and the decree of the chancellor is affirmed.

CLOPTON, J., not sitting.

STONE, C. J.—The spirit of modern jurisprudence is to shorten the time in which business transactions may be made the subject of juridical contention. Statutory bars are shortened, and the courts of the country at the present time are much more inclined than they formerly were to discourage and discountenance the stirring up of ancient, or stale demands. The theory on which the modern policy rests is, that claims of real merit, in these stirring times, will not be permitted to slumber through an indefinite or unreasonable number of years. And, when the case presented is one of patent inequality, one in which the right claimed has no corresponding liability resting on the claimant, courts are much more averse to granting active relief, than if the liabilities were mutual. This Court has placed itself unmistakably on the side of the shorter limitations, and the discouragement of stale claims. *James v. James*, 55 Ala. 525; *Gordon v. Ross*, 63 Ala. 363; *Cotton v. Cotton*, 75 Ala. 345.

I have read and scrutinized the testimony in this record with very great and painstaking care. I find not a semblance of proof that at any time after the spring of 1875, any credit was extended to F. M. Gilmer, to J. N. Gilmer, or to any of the firms with which the latter was connected, on the faith of the stock in the Elyton Land Company as a security. I do not find it was ever mentioned between the parties, or had in contemplation in connection with any of their dealings, when they took place. On the contrary, the proof is, that whenever any credit was extended by Morris, or Morris & Co., to F. M. Gilmer, either for himself, or for any of J. N. Gilmer's firms, other sources of payment were looked to, and stipulated for. And, in fact, I do not find the stock was ever spoken of, or looked to as a means of security, or source of payment, in any of the credits extended by Morris after the stock was transferred and placed with him in 1871, except what is hereafter stated. If it was thought of as a security for any future credits, the present record contains no proof of it. It may be, and probably is, true, that after those debts were contracted, Morris intended that if the stock ever became of sufficient value, he would resort to it as a means of security and payment as far as it would go; but there is neither averment nor proof of any

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agreement to that effect. This, if entertained at all, was a mere uncommunicated intention, and does not amount to a recognition of appellant's continued claim, or ownership of the stock, unless what is hereafter stated shows such to have been the intention. Nor does the fact that Morris, up to the time he disposed of the stock in 1881, would have been willing to have the stock redeemed, if the Gilmers, or either of them, would pay him the several liabilities under which they rested, vary the question. That, at most, was a mere uncommunicated mental purpose—perhaps not thought of, nor entertained at the time it would have been possible of performance. A mere afterthought, which any sane man would entertain, who held a large claim and insufficient means of collection. There must, in the nature of things, be a time in all such transactions, when the pledgee or mortgagee ceases to look upon the thing pledged or mortgaged as a continuing security for a subsisting demand, and commences to treat it as his own property, made such by the pledgor's delay and *laches*. I repeat, there is no testimony—not the slightest—of any act done, or word spoken after the transfer of the stock on the books in 1875, tending to show that any transaction was had between the parties, in which the stock was to any extent a factor, unless the following question and answer furnish such testimony. Morris, while being examined as a witness, was asked, "Then how can you say, Mr. Morris, as you have said, that Mr. Gilmer agreed with you that that stock should be held by you as collateral for anything that he, or Gilmer & Donaldson, or Gilmer, Browder & Co., did owe, or might owe?" The Mr. Gilmer here referred to was F. M. Gilmer. To this Morris answered: "Yes, sir; it is the truth, because I talked to Mr. Gilmer very frequently about it, threatening to sell it."

The firm of Gilmer, Browder & Co. was formed in 1868, and expired in 1873 or 1874, when the firm of Gilmer & Donaldson was formed. The latter firm expired at the death of Mr. Donaldson in 1876. The last transaction had between Morris and Gilmer & Donaldson, of which we have any testimony, were a deposit in March, 1875, and execution against J. N. Gilmer, levied on the stock and paid by Morris, charged against that firm in July, 1875.

No date is fixed by the witness, nor in any other way, when Morris "talked to Mr. Gilmer very frequently about it, threatening to sell" the stock. Whether it was before or after the transfer of the stock on the books, or, if after, how long after, we have no means of finding out. We can not say it was later than 1876, or as late as 1876. We have Morris' uniform testimony that he ceased to look to it as an available demand after the actual transfer of the stock in 1875, and we can not say

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there is any testimony which contradicts this. True, he had some collaterals in his hands, considered at the time of little or no value; though from one of them he realized as much as \$900 as late as 1880. This sum, however, and the stock sold at *par*, fell far short of indemnifying him, or paying him the combined indebtedness of F. M. Gilmer, and the various firms in which J. N. Gilmer was a partner. On the most liberal interpretation, there is no testimony of any transaction which recognizes that Gilmer had any claim on the stock, which we can affirm took place within eight years of the filing of this bill. *Sanders v. Askew*, 79 Ala. 433.

Whatever class the present transaction may have previously belonged to, when by the transfer on the books the title to the stock became vested in Morris, it acquired the properties of a chattel mortgage, the thing mortgaged being in the possession of the mortgagee. For nine years Morris held both the title and the possession of the stock, and during all that time Gilmer is not shown to have asserted any claim to it. In *Humphries v. Terrell*, 1 Ala. 650—decided by this Court more than forty years ago—it was held that six years' possession of a chattel pledged, without demand made, or recognition of the pledgor's right, vested a complete title in the pledgee. That case has not been overruled, and I am not inclined to overrule it. All men will admit that a period of six years vests in the mortgagee a title to a chattel, held for that length of time in independent right.

We are asked to so far modify the chancellor's decree as to make it a dismissal without prejudice to another suit.

The submission in this cause was on pleadings and evidence. When such is the case, if it be desirable, to have the special ruling of the court on the pleadings, it is customary to prefer a request therefor. That does not appear to have been done in this case. The ruling of the chancellor was on the testimony, and governed by it alone, he reached the conclusion that complainant's claim was barred by staleness. We have examined the testimony with great care, and have reached the conclusion that the chancellor did not err in his rulings on the testimony, nor in the application of the law thereto. If the bill had been all the complainant could desire; if it had averred acts of recognition by Morris, so as to relieve the claim of the imputation of staleness, the proof in the present record would not sustain such averments. The claim under the proof would still be stale, and barred on that account. This is not a case of sufficient proof, and insufficient averment. If it were, we would grant the motion and dismiss without prejudice. *Cameron v. Abbott*, 30 Ala. 416; *Munchus v. Harris*, 69 Ala. 506; *Gilmer v. Wallace*, 75 Ala. 220; *Glass v. Glass*, 76 Ala. 368;

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2 Dan. Ch. Pr. *994-95. The record makes no such case. We are asked to grant the order, not because the complainant has shown a right to recover, but fails through defective pleading. The naked proposition is, that the complainant is entitled to the order, that he may have a chance to aver and prove a better case. Would it not be an anomaly, if we were to hold that where the pleadings and proofs are both insufficient, the dismissal will be without prejudice; and yet, if the pleadings be good, and the proof insufficient, the decree will be absolute and final? Such practice is sanctioned by no sound precedent, and is diametrically opposed to that wholesome principle of equity practice which discourages the re-examination of witnesses once examined, except for good reasons satisfactorily shown; and discountenances enlargement of publication, in the absence of a very strong showing. *Johnson v. Glasscock*, 2 Ala. 249; *Grier v. Campbell*, 21 Ala. 327; *Rumbly v. Stainton*, 24 Ala. 712; *Lanier v. Hill*, 30 Ala. 111; *Malone v. Carroll*, 33 Ala. 191; *Smith v. Coleman*, 59 Ala. 260; *Hammersley v. Lambert*, 2 Johns. Ch. 432; 1 Dan. Ch. Pr. *948-49.

We decline to modify the decree of the chancellor.

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Certiorari to Probate Court, to Vacate Order for Election.

1. *Application to judge of probate to quash election proceedings.*—If an order for an election is void on its face, and the appellee has sufficient interest, the application, in the first instance, is properly made to the judge of probate to quash the proceedings.

2. *What should be certified to Circuit Court.*—To enable the Circuit Court to act intelligently, it is necessary to certify to that court the whole matter on which the action of the judge of probate was invoked, so that the Circuit Court could determine, upon an inspection of the record, whether the judge of probate had jurisdiction to order the election and fix the time for holding the same.

3. *Function of the writ of certiorari.*—Its office is to correct errors of law apparent on the record. Where a new jurisdiction is created, and the course of proceeding thereunder is different from the common law, and no provision is made for reviewing the action of the judge, *certiorari* is the proper remedy.

4. *A license not a contract*—But is a permit revocable at the will of the legislature; and where a license has been granted to sell spirituous liquors, and a valid election is afterwards had, resulting in favor of prohibition, it operates to revoke the license, and to convert what is otherwise a lawful business into a criminal offense.

5. *The proceedings to obtain an election under the act approved December 11th, 1884*, create a new, limited and special jurisdiction, not covered by the grant of general jurisdiction to the probate courts,

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and not previously exercised by the judge, requiring for its exercise that the preliminary and essential facts be affirmatively stated.

6. "*An Act to 'regulate' the sale, giving away or otherwise disposing of spirituous liquors,*" does not confer the power to *prohibit* the sale thereof; and where the body of the act provides as well for its *prohibition* as for the regulation of the sale, and the title expresses only that the act is to *regulate the sale*, giving away, &c., of spirituous liquors, such act is violative of the constitutional requirement that, "Each law shall contain but one subject, which shall be clearly expressed in its title."

APPEAL from the Talladega Circuit Court.

Hon. LEROY F. BOX, presiding.

This appeal grew out of proceedings had under the act of December 11th, 1884, enacted by the General Assembly of Alabama, entitled "An Act to regulate the sale, giving away or otherwise disposing of spirituous, vinous or malt liquors, or intoxicating bitters, or patent medicines having alcohol as a base, in Talladega county." Under the authority of that act a petition was filed in the office of the judge of probate of Talladega county, on the 5th day of June, 1885, being a consolidation of two petitions, one dated December 29th, 1884, signed by thirty householders and freeholders of Talladega county, and another petition signed by more than fifty persons, describing themselves as "a portion of the freeholders of said county," dated and filed on said date of June 5th, 1885, praying that an election be had under said act of December 11th, 1884. The judge of probate, Hon. G. R. Miller, issued an order for holding said election, which order was dated June 6th, 1885, appointing the 3d day of August, 1885, as the day for holding the election, of which notice was duly given by the sheriff, and the election was held on said date. The result, as announced, was a majority in favor of "prohibition." Whereupon C. S. Jones, who represented that he was a resident freeholder and householder of Talladega county, and a member of the firm of C. S. Jones & Co., who were engaged in business as retail dealers in vinous, spirituous and malt liquors, in the town of Talladega, in said county, filed his petition, addressed to Judge George R. Miller of the Probate Court of said county, representing that his firm had been licensed to carry on the retail liquor business; had purchased a large stock of liquors for said business, and that petitioner would sustain great loss by the prohibition of the sale thereof; that the election under said act had not been conducted as provided in said act; that the Probate Court had not acquired jurisdiction to order the election, and that the act itself was void. The petition prayed that the election be quashed and annulled, together with all the proceedings and records had and relating to said election. This petition was denied. The petitioner, the said

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C. S. Jones, relator for and in behalf of the State of Alabama, applied to the Circuit Court for the writ of *certiorari* from said court to the said George R. Miller, Judge of Probate, directing a full and complete transcript of all the election proceedings, orders, &c., had in said Court of Probate, to be sent up to said Circuit Court for review, which writ was granted by the judge of the Circuit Court. Motion was made by respondent Miller to dismiss the writ of *certiorari*, on the grounds, first, that said Jones was not a party to the record which was certified by the judge of probate to the Circuit Court; second, that said Jones had no such interest as would enable him to prosecute the writ; third, that said record, certified under said writ, contained two distinct final orders, one ordering an election and the other dismissing the petition of said Jones; and fourth, that the proceedings sought to be reviewed were not judicial, but legislative. The motion to dismiss the writ was refused, and the Circuit Court, upon considering said writ, and the return thereto, granted the motion to vacate and annul, and declare void and of no effect, the election had in Talladega county under said act of December 11, 1884, held on the 3rd of August, 1885, together with all the proceedings had under said act in relation to holding said election. From this order of the Circuit Court this appeal is taken, and the action of said Circuit Court in refusing to dismiss the writ of *certiorari*, upon motion of the judge of probate, and the order annulling the election, are here assigned as error.

JNO. W. BISHOP, JNO. HENDERSON, for appellant.—1. The relator, Jones, is not a party to the record of the election proceedings sought to be vacated.—6 Porter, 505-6; 29 Ala. 194.

2. The relator, Jones, has no such interest in the subject-matter of the litigation as gives him a right to sue out or to prosecute the writ of *certiorari*.—24 Ala. 282; 48 Ala. 540; 49 Ala. 443; 34 Ala. 216 and 278.

3. The probate judge having been the actor in the matter of the election, is a proper party to the appeal.—60 Ala. 271.

4. The writ is dual in its nature, and should not have been granted for that reason.—24 Ala. 282, and cases there cited.

5. This is not a writ of right, but the granting rests in the discretion of the court, to be exercised in view of the equity and justice of the case, and of any considerations of public policy, or convenience involved.—Waits Ac. & Defences, Vol. 2, p. 135; 65 Barb. N. Y. 435; 45 How. Pr. 289; 18 Hun. 175; 52 N. Y. 445.

6. The legislature, together with the agencies employed by it, for the enactment of laws, is independent of and free from judicial interference.—39 Ala. 698; 25 Hun. 131; 43 Barb. 232.

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7. The validity of a law can be assailed only in a proper case. 48 Ala. 540; Cooley on Con. Lim. 160-3-4.

8. The record shows that the judge of probate treated the two petitions filed to bring on the election, as one—either as both constituting one, or the one amendatory of the other, and if either construction will sustain the record, the court will put that construction on it that will sustain the record.—29 Ala. 164; 29 Ala. 542; see specially p. 554, latter case.

9. The act confers jurisdiction on the probate judge, and the petition calls it into exercise. The act does not require an averment that the petitioners are householders and freeholders. At all events, it is amendable, and was amended by treating the two petitions as one.—29 Ala. 164, 542.

10. As to the constitutionality of the act of December 11, 1884.—Acts 1884-5, p. 234, see 75 Ala. 533; 58 Ala. 523; 66 Ala. 493; 43 Ala. 224; 49 Ala. 329; 48 Ala. 579.

HEFLIN, BOWDEN & KNOX, *contra*.—1. The act of the legislature, December 11, 1884, (Acts 1884-5, p. 234), is violative of § 11, Art. IV of the Constitution of Alabama, and is therefore inoperative and void.—*Dorsey's appeal*, 72 Penn. St. 195. The power to *regulate* does not embrace the power to *prohibit*. 6 Ala. 899; 22 Ga. 203; 6 Rich. Sav. (S. C.) 404; 10 Wend. 100; 82 N. Y. 318; 71 Ala. 507; 4 Amer. & Eng. Corp. Cases, p. 300; 12 Kansas, 630; 47 Tex. 548; 53 Barb. 70; 52 Ala. Ala. 198; 35 N. Y. 449; 38 N. Y. 183; 12 Ga. 36; 75 Ala. 533.

2. The Act (Dec. 11, 1884) is not self executing. The first section of the act prescribes what must be done to put it in operation. The jurisdiction of the probate judge in the premises is purely statutory, and can not be exercised except in the manner, and upon the conditions prescribed by the statute.—69 Ala. 571; 66 Ala. 119; 20 Ala. 446; 18 Ala. 694; 72 Ala. 233. The petition did not conform to the requirements of the act, and the jurisdiction never attached. Taken separately or combined, the petition or petitions fail to embody the requirements of the act essential to give the probate judge jurisdiction to order the election.

3. It is the office of the writ of *certiorari* to correct errors of a judicial character in inferior courts, and errors in the determinations of special tribunals, commissioners, magistrates, and officers exercising judicial power, affecting the property or right of a citizen, and who act in a summary way, or in a new way not known to the common law.—Wood on Mandamus, p. 194, *et seq.* The writ is properly issued in the name of the people, upon the relation of an individual.—Citing Wood on Mandamus, p. 210; 10 Ala. 622; 21 Ala. 558; 16 Ala. 362, and numerous other authorities.

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CLOPTON, J.—All judicial tribunals possess the inherent power to vacate, at any time, any order made by them which is void on its face. Such vacation will be made by the court, where the order is made, on motion by any party having an interest.—*Glass v. Glass*, 76 Ala. 368; *Baker v. Barclift*, 76 Ala. 414. If the order for the election is void on its face, and the appellee had sufficient interest, the application to vacate it was properly made, in the first instance, to the judge of probate, whose power and duty were, in such case, to quash the proceedings.—*Savage v. Wolfe*, 69 Ala. 569. The primary purpose of the *certiorari* is to remove into the Circuit Court for revision the order of the judge of probate, denying the petition and motion to vacate his order for the election, and to quash the proceedings. To enable the Circuit Court to act intelligently and advisedly, it was necessary that the subject-matter, on which the action of the judge of probate was invoked, and all the proceedings relating thereto—that is, that the whole case—should be certified; so that the Circuit Court could determine, on an inspection of the record, whether the judge of probate had jurisdiction to order the election and fix a time for holding the same. They were correlative matters. The *certiorari* is not obnoxious to the objection, that it unites in one writ two distinct orders.

The functions of the writ of *certiorari*, at common law, extended to questions of the jurisdiction of the inferior tribunal, as well as to the regularity of the proceedings. Its office is to correct errors of law apparent on the record. The trial is not *de novo*, unless expressly provided by statute. The statute under which the judge ordered the election creates a new jurisdiction. He acts in a summary manner, and in a course different from the common law. No method is provided by which his action may be reviewed. In such case, *certiorari* is the proper remedy, and the Circuit Court, by virtue of its statutory authority to exercise a general superintendence over all inferior jurisdictions, is the proper court to supervise the proceedings. *McAllilley v. Horton*, 75 Ala. 491; *Town of Camden v. Block*, 65 Ala. 236.

It will be conceded, that no one is authorized to become a party to judicial proceedings, and sue out a *certiorari*, who has not an individual interest in the subject matter, which is affected by the proceedings. The interest must relate to him separately from the public. It must be a private right or privilege, which appertains to him, and which, being in his private keeping, he is authorized to vindicate. An interest or right, which he holds in common with the rest of the community, is not sufficient. It is contended, that Jones had no such personal and separate interest. He is a member of a firm, to

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whom a license was issued about May 1, 1885, by the judge of probate, to carry on the business of retailing liquors, which did not expire until January 1, 1886; and was engaged in the business at the time the order for the election was made, and the election was held. Whilst a license to engage in the business of the retail of liquors is not a contract, but is a permit revocable at the will of the legislature; it is nevertheless a personal privilege of value, whatever may be the estimate of the moral character of the business. If the judge of probate made a valid order for an election under authority of a valid statute, the election held in pursuance thereof, having resulted in favor of prohibition, and having been duly published, operates to revoke his license, and to convert what is otherwise a lawful and authorized business into a criminal offense. As such would be the effect of the proceedings if valid, Jones is entitled to test, in any legal mode, their validity as a revocation of his license. His is a legal interest, relating to him individually, which he holds separate and distinct from the rest of the people of the county.

It will not be disputed that the legislature and the agencies employed in the *enactment of laws* are independent of judicial interference; and the courts will not review acts which are legislative. The State government is divided into three distinct departments, and no person, being one of the departments, can exercise any power belonging properly to either of the others, unless expressly directed or permitted by the constitution. Though the abstract proposition asserted by counsel is correct, it is inapplicable and without foundation. Assailing a statute as unconstitutional is not an effort to review a legislative act; and the statute does not undertake or purport to delegate legislative power to the judge of probate. Such delegation is prohibited by the constitution. The office of legislation was performed, when the act, having passed both houses of the General Assembly, was approved by the Governor. The act then became a complete law; only its operation being suspended until the happening of the contingency prescribed by the statute. Judicial and not legislative power is conferred on the judge of probate.

Having ascertained that the circuit court acquired jurisdiction by a proper proceeding instituted by an authorized party, the further inquiry will be addressed to the question of error *vel non* in the judgment from which the appeal is taken.

We assume as a postulate, that the record of every court of statutory limited jurisdiction must affirmatively discover every fact essential to the validity of its orders or judgments. The proceeding to obtain an election under the act is statutory, creating a new, special and limited jurisdiction, not covered by

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the grant of general jurisdiction to the probate court, and not previously exercised by the judge. To put this new jurisdiction into exercise, the preliminary and essential facts must affirmatively appear. *Tally v. Grider*, 66 Ala. 119; *Savage v. Wolfe*, 69 Ala. 569. The statute prescribes and defines the jurisdictional facts: "*Whenever fifty or more resident householders and freeholders of Talladega county file in the office of the judge of probate of said county, a petition in writing, praying for an election, to ascertain the wishes of the people of said county as to the prohibition of the sale of intoxicating liquors in said county, it shall be the duty of said judge to order an election and fix the time for holding the same.*" Acts 1884-85, 234. A petition, signed by fifty or more persons, stating that they are resident householders and freeholders of the county, and praying for an election, filed in the office of the judge of probate, is indispensable to put the proceeding in motion. It is insisted that *and* should be construed as *or*. *And* and *or* may be convertible words, when required by the sense of the statute; otherwise they will be taken as ordinarily used and understood. The object of the legislature was to guard the people against being unduly precipitated into an exciting election; and therefore required that at least fifty persons should pray for an election, who are residents of the county, and possess the qualifications of both freeholders and householders; in whom were combined the interests of permanency in the value of real property, and of protecting and preserving domestic peace and prosperity. Such are the qualifications of the petitioners prescribed by the legislature, and we are not authorized to dispense, by construction, with either of them.

Two petitions were filed. One of them states, that the petitioners are resident freeholders and householders of the county, and otherwise substantially complies with the requirements of the statute; but is signed by only thirty persons. The other, though signed by a sufficient number, fails to aver that the petitioners are householders, and does not pray for an election to ascertain the wishes of the people of the county. It is urged that the two petitions should be considered as amendatory of each other. It may be, that it is not necessary for all the petitioners to sign one petition; that different petitions signed by different persons is a substantial conformity to the statute; but in such case, each petition should contain averments of all the jurisdictional facts. A consolidation of all will not operate to supply fatal omissions in any one. If the two petitions be considered as an amended petition, there is still an omission of the averment that fifty or more of the petitioners are resident freeholders and householders of the

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county ; and it is inoperative to put into exercise the statutory jurisdiction of the judge of probate to order an election and fix the time for holding the same. His order was *coram non judice*, and the entire proceeding a nullity.

The constitutionality of the statute, under authority of which the election was held, also is assailed. While the exigencies of the case do not require the consideration of this question, another election under authority of the act would probably necessitate its determination ; and if unconstitutional, a present decision may promote the public weal, and discover the necessity of such legislation, as the people may desire, and the General Assembly may deem proper and expedient. Section 2 of Article 4 of the Constitution provides : "Each law shall contain but one subject which shall be clearly expressed in its title." This clause has been repeatedly considered by this Court, and received a full and elaborate discussion in *Ballentyne v. Wickersham*, 75 Ala. 533. It was held, that the clause is mandatory, though its requirements should not be so exactly enforced as to embarrass or obstruct legislation. One of the purposes is, to prevent enactments, relating to subjects of which the title gives no intimation, thereby deceiving the legislature by alluring or misleading titles. The inhibition is not directed against the generality or comprehensiveness of the subject expressed in the title ; but the constitutional requirement is, whether it be specified or general, the title shall so clearly express the subject as not to mislead or deceive. *Robinson v. Mont. M. B. & L. Assn.*, 69 Ala. 413 ; *Carson v. The State*, *Ib.* 235.

The title of the act is, "An act to regulate the sale, giving away, or otherwise disposing of spirituous, vinous or malt liquors, or intoxicating bitters, or patent medicines having alcohol as a base, in Talladega County." But one subject is expressed in the title—the regulation of the sale, giving away or otherwise disposing of liquors—and the enquiry is, does the title express the subject contained in the enactment : in other words, are regulation and prohibition the same or distinct subjects ? *Regulate* and *prohibit* have different and distinct meanings, whether understood in their ordinary and common signification, or as defined by the courts in construing statutes. Power granted to a municipal corporation to grant licenses to retailers of liquors, and to regulate them, does not confer power to prohibit, either directly or by a prohibitory charge for a license. *Town of Marion v. Chandler*, 6 Ala. 899 ; *Ex parte Burnett*, 30 Ala. 461 ; In *Joseph v. Randolph*, 71 Ala. 499, it is said : "A constitutional right, though subject to regulation, can not be impaired or destroyed, under the guise or guise of being regulated." To regulate the sale of liquor implies, *ex vi ter-*

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mini, that the business may be engaged in or carried on, subject to established rules or methods. Prohibition is to prevent the business being engaged in or carried on, entirely or partially. The two purposes are incongruous. A title which expresses a purpose to regulate, gives no indication of a purpose to absolutely prohibit. We are constrained to hold the act unconstitutional.

In *Miller v. Jones*, the judgment of the Circuit Court must be affirmed.

The case of *Jones v. Miller*, which was submitted at the same time, is on appeal from the judgment of the Probate Court denying the motion to vacate the order for an election, and to quash the proceedings. After the appeal was taken, but before the transcript was filed in this court, the *certiorari* was sued out, and the judgment of the Circuit Court obtained. This was a waiver of the appeal, and it must be dismissed.

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Bill for Divorce.

1. *Chancellor's conclusion in this case affirmed, there being no decided preponderance of evidence against correctness of.*—On consideration of the evidence in this record, the court can not affirm that there is a decided preponderance against the correctness of the chancellor's conclusion, and therefore affirms his decree refusing to grant a divorce to the complainant.

2. *Alimony; pending suit for divorce; pending appeal to this court.* Pending a suit for divorce, the wife is entitled, as of right, to an allowance for temporary alimony out of the husband's estate (Code, § 2694); but an application for alimony pending an appeal to this court, being subsequent to the appeal, is not subject to revision by this court on the appeal.

APPEAL from the Choctaw Chancery Court.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on 5th April, 1884, by the appellant, a married woman, by next friend, against her husband, the appellee, and sought a divorce *a vinculo matrimonii*, upon the grounds of his alleged intemperance, failure to properly maintain appellant, and cruelty and harsh usage—specific acts of which are averred in the bill. The complainant also prayed that the custody of the three children, the issue of the marriage, be confided to her; and, by petition subsequently filed, prayed that a reasonable allowance for counsel fees, and ali-

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mony, *pendente lite*, be decreed her out of the respondent's estate. The appellee, answering the bill, denied all of its material allegations and made counter charges of maltreatment on the part of the complainant; and, in response to the petition for alimony, averred that his said wife was living apart from him, and was possessed of a separate estate adequate for her support, and approximately equal to that of defendant. Upon the hearing, had upon pleadings and proof, the chancellor was of opinion that the complainant was not entitled to the relief prayed, and caused a decree to be entered dismissing the bill and the petition for alimony. The second petition, pending the appeal to this court, is sufficiently noticed in the opinion.

TOULMIN, TAYLOR & PRINCE, and TAYLOR & ELMORE, for appellant.—(1.) Upon all the testimony, appellant was entitled to the relief prayed in her bill. Evidence discussed with citation of following authority: 1 Bishop on Marriage & Divorce, §§ 742, 719, 720, 730, 736, 747, 768; 2 Bish., *Ib.*, §§ 655–58, 3450–51–55–58. (2.) Alimony should have been allowed. 43 Am. Dec. 778; 68 *Ib.* 481; 63 *Ib.* 289 and note; *Ib.* 665 and note; Code, § 2694 and case cited in foot note. (3.) The costs should not have been charged against the wife.—*Richardson v. Richardson*, 4 Porter, 467. (4.) That the Chancery Court has power to grant alimony after final decree, and that the *proper practice* is to apply for alimony *after decree*—see 11 Ala. 763; Code, § 2694; 36 Am. Dec. 723; 33 Ga. 172, 173; 39 Ind. 185, 187.

W. F. GLOVER, and W. L. BRAGG, *contra*, cited the following authorities: *Daniel v. Daniel*, 27 Ala. 22; *Hughes v. Hughes*, 19 Ala. 306; *Folmar v. Folmar*, 69 Ala. 84; 56 Ala. pp. 94, 157, 576; 66 *Ib.* 162, 362; 68 *Ib.* 598; 72 *Ib.* 294; 74 *Ib.* 243, 359; 71 *Ib.* 556; 74 *Ib.* 379; 74 Ala. 349; 75 *Ib.* 385; 44 Ala. 619; Code, §§ 2694, 2695; 33 Ala. 98; Stewart on Marriage & Divorce, §§ 392 and 383; Porter, 41 Miss. 116, 117, 118; 44 Ala. 438; 70 Ala. 271, 85; 71 Ala. 536; 72 Ala. 467; 30 Ala. 643; 1 Parsons on Cont. 356; Code, § 2685; Constitution Ala. 139, Art. VI, § 2; Code, § 3916; *Ib.* 3926; *Ib.* 3927 and 3967; 1 Bric. Dig. 99, § 228; Code, 156; 1 Bric. Dig. 100; Stewart on Marriage & Divorce, § 366; 77 Ill. 346; *Richardson v. Richardson*, 4 Porter, 479–80.

STONE, C. J.—We have carefully examined the voluminous testimony found in this record, and we are not able to affirm there is a “decided preponderance” against the conclusion reached by the chancellor.—*Nooe v. Garner*, 70 Ala. 443. The clearly established facts show a sad case of family alienation

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and discord, but much of the blame is chargeable to the complainant.—*David v. David*, 27 Ala. 222. The chancellor did not err in refusing to grant the divorce prayed for.

The question of alimony rests on different principles. "Pending a suit for divorce the court must make an allowance for the support of the wife out of the estate of the husband, suitable to his estate, and to the condition in life of the parties." Code of 1876, § 2694. Under this statute, and the construction placed on it, it would seem the question of temporary alimony, or alimony or support pending the suit, is a matter not of discretion, but of right.—*Jeter v. Jeter*, 36 Ala. 391; *Ex parte King*, 27 Ala. 387; *King v. King*, 28 Ala. 315; *Mims v. Mims*, 33 Ala. 98; *Ex parte Smith*, 34 Ala. 455; *Richardson v. Richardson*, 4 Por. 467; s. c., 30 Amer. Dec. 538; *North v. North*, 43 Amer. Dec. 778; *Methvin v. Methvin*, 60 Amer. Dec. 664; *Frith v. Frith*, 63 Amer. Dec. 289; *Pinckard v. Pinckard*, 68 Amer. Dec. 481.

Since the separation the daughters, two in number, remained with the mother, and one of them was sent to school. The only son has been with the father. The wife has a separate estate, in value nearly or quite equal to half the value of the husband's estate. We make no allowance for attorney's fees. That is not compulsory. We order and decree, however, that defendant shall pay to complainant the sum of two hundred dollars for her support pending the suit; and the chancellor will make any orders necessary for carrying this decree into effect.

After the present appeal was taken, a second petition was filed for alimony pending the appeal. This being a proceeding after the appeal, the chancellor's ruling upon it is not before us for consideration.

The costs in the court below will remain as decreed by the chancellor, except the costs on the petition for temporary alimony or support, which will be paid by the defendant. The costs of the appeal in this court will be paid by the appellee; and the costs of appeal in the court below will be paid, one-fourth by the appellee, and three-fourths by complainant's next friend.

Reversed and rendered.

Young v. The East Ala. Railway Co.

Detinue against Common Carrier.

1. *Secondary evidence of document beyond jurisdiction of court.*—Secondary evidence of the contents of a bill of lading may be received, when it is shown that the document is beyond the jurisdiction of the court, in the hands of a person residing in another State.

2. *Bill of lading in name of shipper.*—When the vendor and shipper of goods takes the bill of lading in his own name, he thereby retains the title in himself, and the carrier can not rightfully deliver the goods to any other person, except on his order, or transfer of the bill of lading.

3. *When carrier may maintain detinue.*—If the carrier, through mistake, or by the fraudulent representations of a third person, wrongfully delivers the goods to a person who has no right to them, he may maintain an action of detinue or trover for them, against the person so receiving them, or any other person to whom he may deliver them.

4. *Relation of bailor and bailee.*—If the goods are delivered by the person so wrongfully receiving them to another carrier, on whom he afterwards gives plaintiff an order for them, and this carrier, accepting the order, and receiving the charges for freight, agrees to deliver them to plaintiff on demand; this creates between them the relation of bailor and bailee.

5. *Bailee cannot set up title in third person, but may deliver to rightful owner.*—As a general rule, the bailee cannot set up the title of a third person, in defense of an action by his bailor; but, if the bailor in fact had no valid title, the bailee may deliver the goods to the rightful owner on demand, or hold them subject to his order on notice and demand, the *onus* of proving that defense resting on him.

APPEAL from the Circuit Court of Etowah.

Tried before Hon. JAMES AIKEN.

This action was brought by J. D. Young against the East Alabama Railway Company, a domestic corporation, to recover a pool table, with the value of the use or hire of the same; and was commenced on 18th July, 1884. The plea of the defendant was the general issue. The evidence showed that the plaintiff purchased the pool table in controversy from M. Milburn for the agreed price of two hundred and fifty dollars. The table was, all the time, in the possession of the depot agents of the defendant at Gadsden, consigned to said Milburn. The depot agent agreed to deliver the table to the plaintiff upon his paying the freight charges due upon it, and producing an order from Milburn, but failed and refused to do so upon plaintiff complying with these terms. It was further shown that the table had been shipped by the Brunswick & Balke Collender Co. of Cincinnati, Ohio, to Collinsville, Ala-

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bama, consigned to their own order, and was deposited in the depot of the A. G. S. R. R. Co; that a few days after its arrival, one John Wilson represented himself to the depot agent as the consignee of said table, paid the transportation charges on it, and it was delivered to him; that some time afterwards the table was brought back to the depot at Collinsville and ordered shipped to the said Milburn at Gadsden, over the defendant's railroad.

It was shown by the defendant, against the objection of the plaintiff, that a draft, for the amount of the purchase-money of the pool table, had been sent by the Brunswick & Balke Collender Company of Cincinnati, with a bill of lading attached, to a banking house in Gadsden, for collection; and that said bill of lading stipulated for the delivery of the pool table only upon the order of the shippers—the Brunswick & Balke Collender Company. It was admitted that the depot agent at Collinsville knew, at the time he delivered the pool table to Wilson, that the way-bill showed that it was consigned to the order of the shippers, and that he knew the table he shipped to Milburn, at Gadsden, was the same he had previously delivered to Wilson; that it was upon notice from him that the agent of the defendant at Gadsden refused to deliver the table to the plaintiff. The plaintiff requested the following, among other written charges: "If the jury find that the defendant received the freight from plaintiff when defendant was notified of all the facts in the case, and that defendant has never paid back said freight, or tendered back said freight to plaintiff, then the defendant is estopped from setting up the title of the Brunswick & Balke Collender Company, or of any other third person in defense of this suit"—which charge was refused by the court. Verdict was rendered for the defendant. The admission of parol testimony to show the contents of the bill of lading, and the refusal of the court to give the charges requested by the plaintiff, are here assigned as error.

W. H. DENSON, J. L. TANNER, for appellant.

DUNLAP & DORTCH, and L. A. DOBBS, *contra*.

SOMERVILLE, J.—1. The bill of lading being shown to have been out of the jurisdiction of the court, in the hands of persons resident in the State of Ohio, the court properly ruled that it was competent to prove the contents of the paper by oral evidence. Under this state of facts such secondary evidence was admissible.—*Gordon v. Tweedy*, 74 Ala. 252; *Martin v. Brown*, 75 Ala. 442.

2. The title and property in the goods in controversy very

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obviously did not pass to Milburn under his contract of purchase. The vendors and shippers—the Brunswick & Balke Collender Company of Cincinnati—made themselves the consignees, and by taking the bill of lading from the railroad in their own names, reserved the title in themselves, so that they continued to be the owners of the property.—*McCormick v. Joseph*, 77 Ala. 256. They never authorized the common carrier, the Alabama Great Southern Railroad Company, to deliver the goods to any one except on their order, and it is shown clearly that no such order was given by the transfer of the bill of lading or otherwise.

3. The East Alabama Railroad Company, the defendant in this suit, is shown to have been in the possession of the goods tortiously, the delivery being made to them by the Alabama Great Southern Railroad Company through mistake, and by the fraudulent representations of a third person.

The latter corporation, we may observe here, being a common carrier, and being in the rightful possession of the property as bailee of the original vendors, and this possession being wrongfully displaced, it could, by virtue of its special property in the goods, maintain an action of detinue, or trover, for them, against the defendant, or any other person holding a like tortious possession without title—Story on Bailments, §§ 585, 95.

4. It may be admitted that the defendant railroad company was the bailee of the plaintiff. Although Milburn had no title to the goods, yet he gave to plaintiff an order for them, and the defendant, accepting the order and receiving the charges for freight, agreed to deliver them to the plaintiff on demand. This established between them the relation of bailor and bailee. *Edwards v. Meadows*, 71 Ala. 42.

5-6. The general rule is that the bailee is not permitted to set up a *jus tertii*, or title of a third person, in himself. But where the bailor has no valid title, the bailee may, on demand, deliver the goods bailed to the rightful owner, and this would be a good defense to an action brought by the bailor, the *onus* being on the bailee to establish the defense.—*Powell v. Robinson*, 76 Ala. 423; 2 Kent Com. (12 Ed.) *567. So the bailee may withhold the goods on notice or demand from the true owner, or from one having such a special property in them as would sustain an action of detinue.—2 Herman on Estoppel, § 895. The reason of this rule is, that the bailee of the goods can be in no better situation than the bailor from whom he received them, and the true owner, or other person entitled to their custody and having a special property in them, can sue either the bailor or bailee, and recover from them. And no man shall be rebuked by the law for doing what the law would compel him to do.

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In this case, as we have said, neither the plaintiff nor the defendant—the bailor nor bailee—had any title to, special property in, or rightful possession of the goods. The original vendors in Cincinnati were invested with the legal title, and the Alabama Great Southern Railroad Company with a special property in the goods which would support an action *in specie* for them. The notice and demand from the latter constituted sufficient authority to stop delivery to one having no title or property in them. The defendants' duty not to deal tortiously with the property of an innocent third person can not be affected by the failure of the depot agent, first to tender back to the plaintiff the amount of freight collected on the goods. The law will not compel the defendant to commit a tort by delivering the goods to the plaintiff, because the agent agreed to do so in consideration of the payment of freight.

The rulings of the court were all in harmony with these views, and we find no error in them.

The judgment is affirmed.

Tillman v. De Lacy.

Action for Damages for Conversion of Engine.

1. *No rule defining when chattel loses its character as such and becomes a fixture.*—Different rules prevail, dependent on the relation of the parties, whether of grantor or grantee, landlord and tenant, or executor and heir, and also upon the uses for which the things are intended, whether for the purpose of agriculture, or trade or manufacture.

2. *Same.*—As between mortgagor and mortgagee, the same rules prevail substantially, as between vendor and vendee. There is no material difference whether the chattel is attached before or after the execution of the mortgage—except stronger evidence of intention to annex is required where the chattel is placed subsequent to the execution of the mortgage.

3. *Requisites to convert chattel into part of the realty*—are : 1st. Actual annexation to the realty, or something appurtenant thereto. 2nd. Application to the use or purpose to which that part of the realty, with which it is connected, is appropriated. 3rd. The intention of the party making the annexation to make a permanent accession to the freehold.

4. *Same.*—It may be regarded as a settled rule, that any chattel permanently annexed to the freehold, and which cannot be severed without material injury to the premises, becomes a part of the realty, irrespective of the intention with which it was attached.

5. *Relaxation of the rule.*—It may be required by the future growth and extension of manufacturing industries, that the requisite of physical attachment in or to the soil, be relaxed to the extent that the question of fixtures *vel non* shall depend on the nature and character of the act

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by which the structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act.

6. *Permanency of attachment; how determined.*—The permanency of the attachment does not depend on the strength, or force, or manner of the annexation to the freehold so much as upon its constancy, and upon the uses to which the attached chattel is adapted, the purposes for which designed, and the intention of the party in attaching it.

7. *Tendency of modern decisions.*—The current of modern decisions is in favor of viewing everything as a fixture which has been attached to the realty, with a view to the purposes for which it is held or employed, however slight or temporary the connection between them.

8. *Case at bar.*—In the case at bar the intention must control, the *onus* being on the plaintiff to show that the mortgagor intended that the engine should be a permanent accession to the freehold.

APPEAL from the Circuit Court of Bullock.

Tried before the Hon. H. D. CLAYTON.

This was an action for damages brought by William L. Tillman against J. W. De Lacy, for an alleged conversion by the latter of an engine, upon the following state of facts: Tillman sold a farm to W. D. and E. S. Grace, on time, taking the notes of the purchasers secured by mortgage upon the land sold. Default was made in the payment of these notes, and Tillman foreclosed his mortgage, purchasing the land at the foreclosure sale. Before default, and while the purchasers, W. D. and E. S. Grace, were in possession they placed an upright engine on the premises which they used in running a cotton gin; after the foreclosure, and purchase of the premises by Tillman, the defendant, De Lacy, claiming to have purchased the engine from Grace, carried it off and converted it to his own use. The controversy was, whether the engine passed at the sale as a part of the realty, or whether it was a chattel which Grace had the right to sell to De Lacy. At the trial, the court gave the affirmative charge that if the jury believed the evidence they should find for the defendant. To the giving of this charge the plaintiff excepted, and asked the court to give the following written charge: "Although the engine testified about was what is called a portable engine, yet, if the jury shall find from the evidence that W. D. Grace placed said engine upon the premises testified about for the purpose of furnishing the motive power for ginning the crop of cotton to be grown on said premises, and such other cotton as might be brought on said premises to be ginned, with the intention of enhancing the value of said premises, and of rendering the use and occupation of said premises more convenient and profitable, and did use such engine for such purposes, and with such intention, then said engine became a part of the land on which it was so placed; and if the jury shall further find from the evidence that said engine was, at the time of Tillman's purchase,

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upon said premises, then the said Tillman is entitled to recover of the defendant the value of said engine at the time of its removal, with interest on such value until now, if they find that De Lacy did remove and convert said engine as testified to." The court refused to give this charge, and the plaintiff excepted. The value of the engine was in evidence, as were the facts stated in the opinion, which sufficiently explain the issues involved. There was a verdict for the defendant, and the plaintiff takes this appeal, assigning as error, the charge given and the charge refused by the court.

JAMES T. NORMAN, for appellant.

S. W. MARTIN, *contra*.

CLOPTON, J.—Though there have been attempts in many cases to lay down general rules, no rule has been stated, which clearly defines when a chattel loses its original character, and becomes a part of the realty, to which it may be annexed. Different rules prevail, dependent on the relation of the parties; whether of grantor or grantee, landlord and tenant, or executor and heir; and also dependent on the uses for which the things are intended; whether for the purposes of agriculture, or of trade, or of manufacture. In the present case, the governing rules, so far as dependent on the relation, are those applicable between mortgagor and mortgagee; and to these the inquiry will be confined. As between mortgagor and mortgagee, substantially the same rules prevail as between vendor and vendee, with, it may be, somewhat more liberal application in favor of the mortgagee. There is no material difference, whether the chattel is attached before or after the execution of the mortgage; except that when the articles are annexed subsequently, and are of doubtful nature, it seems that stronger evidence of intention that it is an accession to the freehold, is required, than when annexed at the time of the making of the mortgage. *Gardner v. Finley*, 19 Barb. 317; 1 Jones on Mort., § 436.

The requisites to convert a chattel into a part of the realty are clearly and succinctly stated in *Quinby v. Manhattan C. & C. Co.*, 24 N. J. Eq. 26. 1st,—Actual annexation to the realty, or something appurtenant thereto. 2nd,—Application to the use or purpose to which that part of the realty, with which it is connected, is appropriated. 3rd,—The intention of the party making the annexation, to make a permanent accession to the freehold. *Teaff v. Hewitt*, 1 Ohio St. 511. It may be regarded as a settled rule, that any chattel, permanently annexed to the freehold, and which can not be severed without

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material injury to the premises, becomes a part of the realty, irrespective of the intention with which it was attached. On this doctrine, it was held, in *Harkness v. Sears*, 24 Ala. 493, that *stationary* machinery, erected on land by the owner for his own use, and fixed in or to the ground, or to some substance already constituting a part of the freehold, is an immovable fixture, whether erected for the purpose of trade or of agriculture, and passes by the deed of the vendor, conveying the land. Most of the older and some of the modern cases hold that nothing short of such fixed annexation will suffice; and that no chattel will be regarded as a fixture, unless so firmly fastened to the freehold, that it can not be severed, without breaking or otherwise injuring the premises.

In consequence of the great increase of manufacturing establishments, in which the building has become an incident to the machinery which it contains, there are some cases, which hold that even a nominal attachment to the freehold is not requisite, when the machinery is essential to the use and enjoyment of the realty—where the building and machinery are, to all intents, and for all useful and practical purposes, essentially one. And it may be, that the future growth and extension of such industries will require a general relaxation of the requisite of physical attachment in or to the soil, to the extent that the question of fixtures *vel non* shall depend “on the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act.” *Winslow v. Merchants Ins. Co.* 4 Met. 306; *Merg’s Appeal*, 62 Penn. St. 28; *Wright v. Gray*, 73 Me. 297. Whilst it is not essential to a fixture, that the connection with the freehold shall be to such degree, that it cannot be severed without breaking, or lasting injury to the premises, actual annexation to some degree and in some mode, though it may be slight and indirect or constructive, ordinarily is regarded as requisite.

The permanency of the attachment does not depend on the strength, or force, or manner of the annexation to the freehold, so much as upon its constancy, and upon the uses to which the attached chattel is adapted; the purposes for which designed, and the intention of the party in attaching it. The current of modern decision is, “in favor of viewing everything as a fixture, which has been attached to the realty, with a view to the purposes for which it is held or employed, however slight or temporary the connection between them.” 2 Smith’s Lead. Cas. 221. The general tendency of decision regards the uses for which the chattel is designed, its adaptability to the part of the realty where it is placed, and the intention of the parties, whether for temporary use, or as a permanent accession to the

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freehold, as leading tests. The decision of each case rests on its particular facts and circumstances, which may account for the seeming discrepancies in many cases in the application of requisites for determining the character of a fixture. A review will not serve any useful or practical purpose, where the appellate court does not deal with the facts of the case, other than as they may elucidate the questions of law involved. *Capen v. Rickham*, 35 Conn. 88; *Farrar v. Chanfetete*, 5 Den. 527; *Crane v. Brigham*, 3 Stock 29.

The engine in controversy was put on the land by one of the mortgagors after the making of the mortgage. It was an upright engine and rested on brick or plank on the ground, being sustained in place by its own weight. A house was erected over it, the sills of which rested on the ground, not being set into the soil. The engine was connected by a band with the gin, situated in a house about eighty feet distant. The house containing the engine had no other opening than a small door and window, and the engine could not be removed therefrom without breaking the house for that purpose. It was used to furnish motive power for ginning the cotton raised on the premises, and the cotton of other persons for toll. On these facts, which were uncontroverted, the court gave the affirmative charge in favor of the defendant.

We concede that the engine is to be considered *prima facie* a chattel, being only attached to the land by its own weight, and not connected with any substance constituting a part of the realty, and its use being to furnish motive power to the gin, which, this court has held, is not a fixture. Under the circumstances of the case the intention must control, the *onus* being on the plaintiff to show, that the mortgagor intended, that the engine should be a permanent accession to the freehold, and an enhancement of its value—that is, should be a part of the land. The intention must be determined by the jury on all the facts and circumstances, including the manner of attachment and the use for which the engine was employed. *Ewell on Fixtures*, 22, 32. The charge of the court withdrew the fact of intention from the consideration of the jury; a fact to be inferred from the evidence and material to the decision of the case. The charge requested by the plaintiff was calculated to mislead, and was properly refused.

Reversed and remanded.

Jones v. Collins.

Suit on Promissory Note.

1. *Appeal from justice's judgment when sum claimed exceeds twenty dollars; formation of issue.*—On appeal from a justice's judgment, when the sum claimed exceeds twenty dollars, the cause must be tried "on an issue to be made up under the direction of the court (Code, § 3122); but it is not necessary that the record should show the active interference of the court in the formation of the issue, when not requested; and it will be presumed, when pleas to the merits are found in the record, that the cause was tried on them without objection.

2. *Joining issue, without objection, on defective pleas; effect of.*—Issue being joined, without objection, on defective or insufficient pleas, advantage can not be taken of their defects on error.

APPEAL from Lee Circuit Court.

Tried before Hon. H. D. CLAYTON.

The appellee, Collins, recovered of the appellant, DeKalb Jones, a judgment in a justice court on two promissory notes executed by the latter to the former. On appeal to the ensuing term of the Circuit Court the plaintiff filed his complaint declaring on said notes; and issue was joined on a number of special pleas filed by the defendant, averring, in substance: (1). That said notes were executed by the defendant while he was so intoxicated as to be deprived of his reason and understanding; (2) that a part of the consideration of said notes was the price of whiskey and other intoxicating beverages sold by the plaintiff to defendant at divers times on Sundays; (3) that said notes were given in consideration of spirituous, vinous or malt liquors sold to the defendant at a time when he was known to be of intemperate habits; (4) that a part of the consideration of said notes was for vinous or spirituous liquors sold by plaintiff to defendant in less quantities than one quart; and said plaintiff, at the time of said sales, did not have a license to sell as provided by law; (5) that the notes sued on were given in consideration of spirituous, vinous or malt liquors sold to defendant at a time when the defendant was of known intemperate habits—"which was known to the plaintiff." The evidence adduced tended to sustain the allegations of the various pleas, but it is not necessary to an understanding of the opinion that it should be here summarized. The defendant requested the court, in writing, to give four charges; the first of which was the general charge that, if the

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jury believed all the evidence, they should find for the defendant; and the remaining three presenting the matters of defense embraced in the 1st, 3rd and 5th pleas above noted. The refusal of the court to give these charges is here assigned as error.

GEO. P. HARRISON, JR., for appellant.

W. H. BARNES, *contra*.

STONE, C. J.—On the trial of an appeal from a justice's judgment, the statute directs that "when [the sum claimed] exceeds twenty dollars [the cause must be tried] upon an issue to be made up under the direction of the court, and tried by a jury." Code of 1876, § 3122. The present case was an appeal from a justice's judgment, and the sum claimed exceeded twenty dollars. Certain pleas of the defendant are found in the record; but it happens that they were filed before the complaint was tendered in the Circuit Court. A complaint had been filed before the justice; but before the trial in the Circuit Court another and more formal complaint was presented, on which it must be inferred the trial was had.

It is contended for appellee that inasmuch as the record does not show that the issue was made up under the direction of the court, we can not consider the defendant's pleas as forming any part of the issue; but must presume that the case was tried only on the general issue. We can not assent to this. We do not hold it essential that the record shall show affirmatively that the court directed the formation of the issue. Nor do we think it necessary that the court shall participate actively therein, unless thereto requested. Counsel usually prepare their own pleadings, and form their own issues; and if the court is not asked to give direction, nor to rule on the pleadings, and pleas to the merits are found in the transcript, we will presume the cause was tried on the issue thus presented.

It is objected that each of the pleas is insufficient. No demurrer was interposed to them, and their sufficiency is not before us. Issue being formed upon them, as is shown by the record, if the defendant proved the truth of either one of them, he made good his defense. *Mudge v. Treat*, 57 Ala. 1.

As the record now appears, charges 2, 3 and 4, asked by defendant, ought to have been given.

Reversed and remanded.

Clark v. McCrary.*Assumpsit.*

1. *Bill of exceptions; agreement of counsel can not operate as.*—An agreement of counsel can not operate as a substitute for a bill of exceptions.

2. *Same; when court can not revise charge or judgment in absence of.*—The cause being submitted to the court on an agreed statement of facts, in which it is stipulated that the court shall, on the admitted facts, give a general charge in favor of either party, and render judgment as on verdict; that the party against whom he decides shall have an exception to the charge, and may prosecute an appeal; this court can not revise the charge or judgment, in the absence of a bill of exceptions properly signed.

APPEAL from the Circuit Court of Hale.
Tried before Hon. JOHN MOORE.

THOMAS R. ROULHAC, for appellant.

THOS. SEAY, *contra*.

SOMERVILLE, J.—This cause was tried below upon an agreed statement of facts. No bill of exceptions anywhere appears in the record. We find what purports to be an agreement of counsel, by which it was stipulated that the circuit judge should, after considering the facts, give the general charge for the one party or the other, as he might determine, and a judgment should be entered accordingly as upon the verdict of a jury. This the record shows was done. It is, moreover, agreed that either party against whom the cause was decided, should have an exception to the charge, and might prosecute an appeal to this court.

In the absence of a bill of exceptions, properly signed by the presiding judge in the manner prescribed by statute, we can not review the correctness of this ruling. The agreement of counsel can not be made a substitute for this statutory requirement. This is fully settled by our past decisions, to which we refer without discussion. *Southern Express Co. v. Black*, 54 Ala. 177; *Kirby v. Vann*, 51 Ala. 221; *Kirby v. Vann*, 52 Ala. 7; *Pearce v. Clements*, 72 Ala. 256.

The judgment must necessarily be affirmed.

Hyde v. Adams.

Attachment.

1. *Security for costs; overruling of motion to dismiss suit for want of; when revisable.*—In an action brought by a corporation, or a non-resident, the overruling of a motion to dismiss the suit, on account of a failure to give security for the costs, is not revisable on error or appeal, unless reserved by bill of exceptions.

2. *Attachment; when writ not necessary to be signed or certified by officer issuing it.*—If an affidavit for an attachment is in fact made before the officer who issues the writ, it is not necessary that it shall be signed or certified by him; and a plea in abatement, "because it was not signed by the clerk," presents an immaterial issue.

3. *Attachment bond; when indorsement of approval by clerk not necessary.*—If an attachment bond is in fact approved by the clerk, filed, and the attachment issued on the faith of it, it is not necessary that his approval shall also be indorsed on it.

4. *General charge; when this court will presume the giving of justified by the evidence.*—When the bill of exceptions states that the "plaintiff introduced his verified account, and, this being all the evidence," the court gave a general charge in his favor; this court will presume, in the absence of anything to the contrary in the record, that the evidence justified the charge.

APPEAL from Fayette Circuit Court.

Tried before Hon. S. H. SPROTT.

This action was brought by John J. Adams & Co., a mercantile partnership of New Orleans, La., against James H. Hyde; and was commenced by original attachment issued upon affidavit made on 26th January, 1885, before the clerk of the Circuit Court of said county of Fayette. At the ensuing Spring term of said court, which was the return term of the attachment, the defendant moved to dismiss the attachment proceedings because the affidavit supporting the same showed on its face that the plaintiffs were non-residents of Alabama, "and yet they had failed to give security for costs." The defendant also filed three pleas in abatement; the first of which averred the insufficiency of the attachment because the affidavit "was not signed by the clerk of the Circuit Court before whom it purported to have been made;" and the third because "the bond for attachment was never signed before or approved by the clerk of the Circuit Court, or other officer authorized to act in the premises." At the Fall term of the court, to which the case was continued, the defendant's motion to dismiss for want of security for costs was overruled; and

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the clerk was allowed upon motion of the plaintiffs, and against the objection and exception of defendants, to certify the affidavit and approve the bond, upon preliminary proof of the signature, under oath administered by the clerk, of the affidavit by the party who procured the issuance of the attachment. The remaining ground of exception is disclosed by the opinion.

McEACHIN & McEACHIN, McGUIRE & COLLIER, for appellant.

NE SMITH & SANFORD, *contra*, cited the following authorities : Acts 1884-85, p. 137 ; 6 Porter, 109 ; 33 Ala. 674 ; 30 Ala. 120 ; 1 Ala. 312 ; *Simms v. Jacobson*, 51 Ala. 188 ; 44 Ala. 605 ; 7 Porter, 483 ; *McCartney v. Branch Bank at Huntsville*, 3 Ala. 709 ; Naples on Attachment, 83, 84 ; Drake on Attachment, sec. 90.

CLOPTON, J.—It does not appear from the record, that an objection or exception was taken to the decision of the Circuit Court, overruling the motion to dismiss for the alleged failure of the plaintiffs to give security for costs. In *Tuscaloosa Wharf Co. v. Mayor and Ald. of Tuscaloosa*, 38 Ala. 514, where the question was fully considered, it was held, that the ruling on such motion must be the subject of objection or exception, in order that it may be revisable, and that an exception is not necessarily dispensed with by the appearance of the objectionable ruling upon the record. On the authority of this case, we refrain from revising the ruling of the court on the motion to dismiss for the failure to give security for the costs.

The affidavit, preliminary to the issue of the attachment, was not certified by the clerk, before or at the time of its issue. The court, on motion of the plaintiffs, allowed the clerk to certify the affidavit after the plea in abatement was filed. The issue presented by the plea is not, that the attachment was issued without the affidavit required by law. If such issue had been presented, it may be, that we should hold, on the facts disclosed by the bill of exceptions, there was not the due administration of a solemn oath, required in judicial proceedings. The administration of the oath should be of such form and character, that an indictment for perjury can be predicated thereon ; and there should be such substantial ceremony, as to impress the affiant with the solemnity of the proceeding. But without averring that no affidavit was made as required by the statute, the plea presents the single issue, that, "it was not *signed* by the clerk" before or at the time of the issue of the attachment. This is an immaterial issue. The statute

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requires the oath to be reduced to writing, and *subscribed by the party*; but is silent as to certification by the officer. It has been ruled by this court, that if an affidavit is actually sworn to before the officer, who issues the attachment, his omission to certify the affidavit will not vitiate the proceedings. *McCartney v. Br. Bk. at Huntsville*, 3 Ala. 709. Code § 3255. An attachment issued without affidavit can be abated only on plea of the defendant putting such fact in issue. The failure of the clerk to certify the affidavit is a defect of form, and amendable before, or during the trial. Code § 3315.

A defective or insufficient bond does not authorize the court to abate an attachment, if the plaintiff is willing to execute another and sufficient bond; though if he declines to do so, the attachment may be abated. (§ 3515). There is no express statutory requisition, that the bond shall be *endorsed* approved by the officer issuing the attachment. The reception of the bond by the clerk, the issuing the attachment by virtue thereof, endorsing it *filed* on the day the attachment was issued, and its retention among the papers of the case on the files of the court, sufficiently manifest his approval. *Pearson v. Gayle*, 11 Ala. 278. *Dothard v. Sheid*, 69 Ala. 135.

The bill of exceptions states, that "the plaintiff introduced his verified account, and this being all the evidence," the court gave the affirmative charge in favor of the plaintiffs. The "*verified account*," it seems, was introduced without objection, which was a waiver of all objection to its competency. Being admitted without objection, and in the absence of any statements of its character, or contents, we must presume, that it was sufficient to establish a *prima facie* case of indebtedness, which entitled the plaintiffs to recover in the absence of countervailing or conflicting proof. When an affirmative charge is given, which would be correct on any state of facts, we presume there was testimony which authorized the charge, unless the record affirmatively shows the contrary. The record not showing the insufficiency of the verified account, we will presume, in the absence of any question being raised as to its competency or sufficiency, that it was sufficient to authorize the affirmative charge. *Alexander v. Alexander*, 71 Ala. 295.

Affirmed.

Hooper v. Hardie.

Bill of Review for Error Apparent.

1. *Bill seeking sale of decedent's lands for payment of debts; proof as against infant defendants.*—When a bill seeks to sell a decedent's lands for the payment of debts, because of the insufficiency of personal assets, the existence of the debts and the deficiency of personal assets must be proved, as against infant defendants, by other evidence than the admissions of their guardian *ad litem*.

2. *Decree based on admissions of guardian ad litem; when infants may file bill of review.*—If the record shows that the decree was founded only on the admissions of the guardian *ad litem* of the infants, they may file a bill of review within three years after attaining their majority; and the proceedings will be reversed back to the pleadings, in order that a hearing may be had on legal evidence.

APPEAL from the Chancery Court of Russell.

Heard before the Hon. JNO. A. FOSTER.

This was a bill in equity, filed on August 6th, 1883, by Robert F. Hardie against Geo. D. and G. W. Hooper, D. B. Mitchell and others, and sought to review and reverse, on the ground of error apparent, a decree which said court had rendered on November 19th, 1867, in a cause wherein the said D. B. Mitchell, as administrator *de bonis non* of Robert Hardie, deceased, was complainant, and the widow of said Hardie and two minor heirs (one of whom was the present complainant) were, with others, defendants. The object of Mitchell's bill was to obtain a decree for the sale of the lands belonging to his intestate's estate upon the ground, among others, that the personal assets of said intestate were insufficient to pay his debts; and the lands were duly sold in pursuance of a decree rendered, on the date above mentioned, in accordance with the prayer of the bill. The two minor defendants, Sarah J. Hardie and the complainant in the present bill, were represented by their guardian *ad litem*, L. F. McCoy. Among the errors assigned by the bill of review, as apparent upon the record of the suit instituted by Mitchell, are the following: "(2.) In the action of the register in appointing the said L. F. McCoy the guardian *ad litem* of your orator and sister without any service on any one, and simply on his acceptance of service as shown in the bill in this case; (3.) Because your orator and his sister were never properly in court as shown by the *subpoena* in the case, and the register had no

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jurisdiction to appoint a guardian *ad litem* in this case; (4.) There is error against this complainant and his said sister in the action of the court in rendering the decree for the sale of the lands on the consent of L. F. McCoy, and also in the various consent decrees rendered in the case, and especially in the decrees confirming the sale of the said lands and ordering deeds made to G. D. and G. W. Hooper to the lands by consent and without proof as to the value of the lands."

The bill of complainant was amended on 4th August, 1884, by adding, as parties defendant, the widow and heirs of G. W. Hooper who had died after the institution of complainant's suit. Demurrers were interposed to both the original and amended bills and numerous grounds of demurrer assigned—the most important of which are sufficiently indicated in the opinion. The overruling of the demurrers is here assigned as error.

J. B. COLLIER, THORINGTON & SMITH, for appellants.

W. H. BARNES, *contra*.

STONE, C. J.—There is nothing in the objection that this bill was not filed in time.—Code of 1876, § 3843. The present bill was filed in less than three years after the complainant became of age. The amendment afterwards made and allowed did not annul or abrogate the filing, which was done August 6, 1883; several days before the three years limit after Hardie became of age.

Nor was it necessary that the bill should set forth in what respect the complainant was injured by the first decree, if there was error apparent on the face of it. According to the averments of the bill, and they are sustained by what are averred to be copies from the record of the former suit, almost every step taken was on admissions and consents made by the guardian *ad litem*. These admissions and consents he had no authority to make. We do not intend to say a guardian *ad litem* can waive nothing, or can make no admissions. What we do affirm is, that when the object of the bill is to sell lands of an estate to pay debts, because of an insufficiency of personal property to pay them, the fact of such debts, and the deficiency of personal assets, must be shown by other testimony than the consent or admission of the guardian *ad litem* of an infant heir. We fully approve both the opinion and decree of Chief Justice MARSHALL in *Bank of U. S. v. Ritchie*, 8 Pet. 128.

If the state of the record of the former suit be such as is set forth in the present bill, the decree should be reversed back

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to the pleadings, that there may be a further and fuller trial on legal testimony.—*McCall v. McCurdy*, 67 Ala. 65.

There is no error in the decretal order of the chancellor overruling the demurrer.

Affirmed.

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Statutory Real Action in Nature of Ejectment.

1. *Ejectment ; what essential to maintain.*—To maintain ejectment, or the statutory action in the nature of ejectment, the plaintiff must have, at the commencement of the suit, the legal title, and the right of immediate possession.

2. *Mortgagee ; when legal title in.*—A mortgagee has the legal title, and the right of immediate possession, unless the instrument contains a stipulation postponing his right of possession.

3. *Effect of stipulations in mortgage, on mortgagee's right to maintain ejectment (this case).*—The mortgage having been given to secure the payment of a note which the mortgagor had assigned to the mortgagee, and containing a stipulation that the latter should not “institute any proceeding to foreclose,” until the maker and indorser had been sued to insolvency, the right to take possession is postponed until the happening of this contingency; and the mortgagee can not maintain ejectment before that time.

APPEAL from Macon Circuit Court.

Tried before Hon. J. E. COBB.

This action was brought by E. H. Grandin, as executor of John A. M. Battle, deceased, against Wm. H. Hurt, to recover the possession of a tract of land particularly described in the complaint, with damages for its detention; and was commenced on the 5th March, 1884. The defendant pleaded the general issue and adverse possession for ten years; and issue was joined on those pleas. The plaintiff deduced title to the premises in controversy through a mortgage executed to his testate by John B. Bilbro on 22d May, 1866. This conveyance, which was introduced in evidence, purported to be given to the said Battle by the said Bilbro to secure the payment of three promissory notes of designated amounts and dates of payment: the first made by W. N. Martin to J. C. Abercrombie and successively endorsed by Abercrombie and Bilbro to said Battle; the second likewise made by W. N. Martin and payable to R. A. Martin and endorsed through Abercrombie and Bilbro to said Battle; and the third executed by said Bilbro to Battle on 13th August, 1865, and payable twelve months after date. As re-

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cited in the bill of exceptions, "John B. Bilbro was introduced by defendant who identified himself as the John B. Bilbro named in said mortgage; he testified that he went into possession of said lands in the fall of 1865, and remained in possession of same until 1878, when the defendant entered under him, the witness. Witness was asked on cross-examination if he had ever paid anything on said mortgage and he answered that he had not, the conditions not having transpired, as he understood the mortgage, on which he was to pay." The stipulation in the mortgage as to foreclosure, relied upon by the defendant in resisting the action, is copied in the opinion. The court instructed the jury, upon the written request of the defendant, that if they believed the evidence they would find for the defendant. This charge, and the admission of certain testimony against the objection of plaintiff, are here assigned as error.

THOS. G. JONES, for appellant.

W. F. FOSTER, *contra*.

SOMERVILLE, J.—In order to maintain the action of ejectment, the plaintiff must have, at the time of suit brought, not only the legal title, but also the right of immediate possession.

As mortgagee, in the present case, he unquestionably had the legal title to the premises sued for, and would be entitled to take immediate possession, if the instrument were silent in its terms on this point. But our construction of the mortgage is, that it postpones the mortgagee's right to take possession, until the happening of a contingency, which is shown not to have transpired; and, for this reason, ejectment will not lie. The express stipulation in the instrument is, that the mortgagee would not "institute any proceedings to foreclose the mortgage," until the maker and endorser of two of the notes had been sued to insolvency. This was necessary in order to establish the liability of the mortgagee, who had assigned these notes by endorsement. It is proved that this condition had not been fulfilled. We do not understand that the word "foreclose" is here used in any technical sense. It must be construed in its popular signification, which is, to enforce by any form of legal proceeding. The implication is clear, that the mortgagor's possession was not to be disturbed, until the happening of the contingency provided for by the terms of the instrument. *McMillan v. Otis*, 74 Ala. 560.

The rulings of the court were in accordance with this construction, and were free from error; and the judgment is affirmed.

Ehrman v. Stanfield.*Action on Arbitrators' Award.*

1. *Arbitration; submission to, at common law.*—At common law, a submission to arbitration was not required to be in writing; and such mode of arbitration is not affected by statutory provisions.

2. *Award of sum of money without fixing day of payment; how construed.*—When a sum of money is awarded in favor of one party against the other, and no day of payment is fixed, it is construed as payable *instantly*; and not being paid on delivery of a copy, an action may be brought on the award.

3. *Award; scope and conclusiveness of.*—The matter submitted to arbitration being “the disputed question of damages arising from an injunction sued out by one party against the other,” if the submission includes the two questions of liability and amount of damages, the award is equally conclusive of both, unless impeached for good cause; if only the question of amount, the liability is conceded; and in either case, the papers in the injunction suit, being only relevant to the question of liability, are not competent evidence in an action on the award.

4. *Same.*—If the penalty of the injunction bond be the limit of the arbitrators' authority in amount, and their award is in excess of that sum, it not being shown that any matter outside of the submission was considered by them, the award is not void *in toto*; but, the excess being remitted by plaintiff, he may have judgment for the residue.

APPEAL from Chilton Circuit Court.

Tried before Hon. JAMES E. COBB.

This was an action by James M. Stanfield to recover the amount of an arbitrators' award, rendered in his favor, against R. Ehrman; and was commenced on 7th September, 1885. The complaint averred, in substance, that the defendant, Ehrman, being the complainant in a suit pending in the Chancery Court of Chilton county, in which the said Stanfield and others were respondents, procured an injunction to be issued by Hon. T. M. Arrington, judge of the City Court of Montgomery, against the said Stanfield and his co-respondents, the amount of the injunction bond being fixed at \$300.00; that subsequently, on 8th August, 1885, the said Stanfield and the said Ehrman submitted to certain designated persons, as arbitrators, “the disputed questions of damages arising from said injunction; and that said arbitrators found that the said P. Ehrman, for and on account of said damages, owed the said James M. Stanfield the sum of \$352.00.” The complaint further alleges that the award was rendered in pursuance of the terms of submission and that the defendant was duly furnished, by the arbitrators, with a copy of said award. The defendant demurred to the com-

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plaint; assigning, among others, as grounds of demurrer: "(3) That the complaint does not show when the agreement to submit was entered into, nor when the arbitrators were to meet and make their decision, nor does the complaint show what matters the agreement to arbitrate covered; (8) That the complaint does not show when the award was to be performed, nor when the money awarded was to be paid; and there is no averment that the defendant failed to pay, after he was notified of the award; and there is no averment in the complaint showing that the defendant failed to pay the said award at the time he was required by said award to pay the same." The demurrer was overruled by the court, appropriate exception being taken by the defendant; and issue was joined on the plea of the general issue, the trial resulting in a verdict and judgment for the plaintiff in the sum of \$300.00. During the trial, as recited in the bill of exceptions, "The defendant offered the file of chancery papers, including the bill, answer and the decree, the interlocutory decree rendered by the chancellor. The plaintiff objected to the introduction of this evidence, and the court sustained the objection of plaintiff and ruled out the said bill, answer and decree; and to this action of the court the defendant excepted." The court also sustained objections of the plaintiff to the proposed introduction, separately, of the said bill, answer and decree, and the defendant duly excepted. The court, among other things, charged the jury "that, although the award of the arbitrators was in excess of the amount of the injunction bond, it was not void on that account only; and would be void on that account only as to the excess over \$300.00." To the giving of this charge, and the refusal to give the instruction substantially set out in the opinion, the defendant duly excepted; and here assigns the same, together with the adverse rulings above noted, as error.

W. A. COLLIER, and WATTS & SON, for appellant.

JONES & FALKNER, *contra*.

CLOPTON, J.—The statutes, prescribing the mode of submission, and the requisites of an award, do not prevent persons from settling any matter of controversy, by a reference to arbitration at common law. Code, § 3548. When the submission is not pursuant to the statute, the common law remedies to enforce the award must be adopted. To constitute a valid award in such case, it is requisite, there shall be a submission by the parties of an existing matter of difference to arbitrators, and an award made, which finally determines the matter of controversy, and is within the scope of the authority of the arbitra-

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tors. The present suit is brought on an award delivered under a submission according to the common law. A demurrer was interposed directed to the sufficiency of the averments of the complaint in specific respects, and also the validity of the award is assailed by a charge requested by the defendant.

It is not necessary, that the complaint shall set forth an agreement in writing to submit. A submission, in a case like this, may be in writing or by parol. The complaint specifically and sufficiently shows the question of dispute, being the amount of damages on account of an injunction, granted by the judge of the City Court of Montgomery, and, identifies the suit, in which it was granted by a description of the parties thereto, and the court in which it is pending; and then avers, "that on the said 8th day of August, 1885, the said plaintiff and the defendant submitted to said arbitrators, the disputed question of damages arising from said injunction;" the names of the arbitrators, and the rendition of the award on August 8th, 1885, having been previously averred. An unexecuted agreement is not sufficient. A submission is the material and essential matter, which, though by parol, necessarily implies a promise to submit and abide by the award.

Whatever may be the legal necessity for an averment in the complaint, when the award does not state the fact, that the defendant had notice of the time and place, when and where the arbitrators would meet to hear and determine the controversy, as to which the decisions are not in harmony; and conceding the necessity that both parties shall have an opportunity of being heard, the absence of such averment is not assigned as cause of demurrer, and under the statute, can not be considered.

The complaint avers, that the arbitrators found, that the defendant owed the plaintiff an ascertained amount on account of the damages sustained by the injunction, but does not aver that any day of payment was fixed. It is not essential to either the certainty or the finality of an award for the payment of money, that a time in the future shall be specified within which it is to be paid. Such award, when no day of payment is fixed, will ordinarily be construed as an award to pay *instantly*. No demand is necessary. The party, on whom the duty to pay is devolved, must seek the payee. *Squire v. Grevil*, Holt, 81; Moore on Arbitration, 548. The complaint avers, that the award was made August 8th, 1885, and that a copy was furnished to the defendant. It sufficiently shows that the amount awarded was payable before the institution of the suit.

The facts of the case are presented in an intelligible form, and so that a material issue can be taken by the adverse party.

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There was no error in overruling the demurrer on any of the causes assigned.

By the submission, either the questions of liability and amount of damages, or only the question of amount, were submitted. If the former, the award is conclusive as to both liability and amount, no fraud, corruption, or partiality or other sufficient objection to common law award, being alleged or proved. If the latter, the defendant, by the submission, waived or conceded the matter of liability. The issues in the suit relate to the facts of the submission, and the making of the award, and its validity. The papers and orders in the chancery suit, other than the bond, which was introduced in evidence by the defendant without objection, do not shed any light upon, and are not relevant to the issues between the parties. They would serve only to introduce into the investigation the question of liability on the bond, without tending to show the extent of the authority of the arbitrators. They were properly excluded.

The remaining question arises on an instruction requested by the defendant substantially as follows: If the jury find, that the matter submitted to the arbitrators was the damage for which the defendant was liable on the injunction bond; that the penalty of the bond is only three hundred dollars; and that the award is for three hundred and fifty-two dollars, the plaintiff is not entitled to recover. The principle, underlying the proposition of the charge, is, that the bond limits the authority of the arbitrators, and the award, being for a sum exceeding the amount of the bond, is wholly void. The rule is well settled, that the arbitrators derive their powers entirely from the submission, and while the award should be co-extensive therewith, it must not include any matter not within its terms and scope. If it does, it will be void *in toto*, or for the excess, according to circumstances. If it contains an allowance for any matter not authorized, and which is not separable from the allowance for the matter submitted, the entire award is vitiated; but if such allowance is, upon the face of the award, distinguishable from the authorized residue, and so disconnected, that the one is not dependent upon the other, and each does not enter into the consideration of the several allowances, the award will be upheld except as to the excess.—*Reynolds v. Reynolds*, 15 Ala. 398; 6 Wait's Ac. & Def. 548.

On the hypothesis of the charge, the matter submitted to the arbitrators was the damage, for which defendant was liable on the injunction bond. There is a manifest difference between the nature and character of the damages naturally and proximately resulting from a breach of the bond, and the amount of recovery in a suit thereon as limited by the penalty.

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The actual damages may largely exceed the sum of the bond. It does not appear from the award, and there is no effort to show, that the arbitrators considered or allowed any element of damage, which was foreign to the submission, or for which the defendant was not liable on the bond. The contention is, that the arbitrators awarded an amount in excess of what could have been recovered in an action at law on the bond; and therefore it must be presumed, the arbitrators considered some element of damage not referred, and not covered by the bond. Arbitration as a mode of settling disputes and controversies, is encouraged and highly favored by the law and courts. Awards are construed with great liberality, and all reasonable intentions are made to support them. Unless the contrary appears from the award, or is affirmatively shown, the presumption prevails, that the arbitrators have not exceeded their authority. The burden is upon the party impeaching to show, that matters not submitted were considered and allowed.---*Burns v Hendrix*, 54 Ala. 78.

On the presumption, that the arbitrators did not estimate any *unauthorized element* of damage, the question arises, is the award void *in toto*, because they found the actual and legitimate damages to exceed the sum, for which a recovery could be had on the bond? Where the parties submitted a controverted matter to arbitrators, who, in addition to damages, awarded costs, which were not included in the submission, the award was sustained as to the damages, but held bad as to the costs.—*Day v. Hooper*, 51 Me. 178; *Genter v. Carter*, 16 Md. 509. The inquiry is, does the award demarkate the good and bad parts? Conceding that the penalty of the bond, by the terms of submission, limited the sum, which the arbitrators were authorized to award, and applying the rule of presumption in favor of the correctness and validity of awards, the excess of authority only consists in the sum awarded, and not because of the consideration of any matter not comprehended in the submission. It was a mere error of judgment as to the amount, and not as to the elements, of damages, which they were authorized to award. The award, construed in connection with the submission, furnishes the means of separating that which is in excess of authority from the remainder. In the absence of evidence showing that any matter not comprehended was considered, or that the excess entered into the consideration of the residue, or that the one is dependent upon the other, and the good and bad parts being separable, the award will be sustained to the extent of the authority of the arbitrators.

As the plaintiff remitted the excess, we have not considered, and do not decide whether, under the terms of the submission,

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the authority of the arbitrators was limited by the sum of the bond; but have decided the case on the seeming concession by both parties, that their authority was so limited.

Affirmed.

Woodward Iron Company v. Jones.

Action by Employee against Domestic Corporation for Personal Injuries.

1. *Contributory negligence; when employee not guilty of, after notifying employer of defect in machinery.*—When a workman or servant gives notice to his employer of a defect in the machinery which he is required to use, and relying on his employer's promise to have the defect remedied, continues in the service, he is not guilty of contributory negligence, "at least until a reasonable time elapses within which to make the repairs."

2. *In action for damages, employee need not aver that employer had reasonable time after notice to repair.*—In an action to recover damages on account of injuries afterwards sustained, it is not necessary to aver in the complaint that the employer had had reasonable time to remedy the defect after the notice was given.

3. *Contributory negligence; when employee guilty of.*—When the plaintiff was working in the shaft of a coal mine, through which ran two railroad tracks, over which cars descended and brought up coal, the motive power being supplied by a stationary steam engine above ground; and had charge of a switch at a resting place along the line of a shaft, where descending cars could be turned off or placed back on the track, and of an adjacent sump in which water was accumulated, and from which it was pumped to the surface by the engine; and while standing on the track, repairing the water-pipe which had become clogged, was struck by a descending car, which he did not see or hear until too late, on account of the noise and steam in the shaft, the steam having escaped from a defective joint in the pipe, to which he had called the attention of the superintendent two days before; *held*, that the plaintiff knowing that the empty car was above, and having neglected to have the switch turned by his assistant, whom he had sent up to that point for another purpose, and being cognizant of the noise and steam which filled the shaft, was guilty of contributory negligence, and was not entitled to recover, although the general order was that a descending car should not be stopped at the switch unless a full car was ready to be carried back.

APPEAL from the City Court of Birmingham.

Tried before Hon. H. A. SHARPE.

The opinion states the case. Charge No. 5, referred to in the opinion, was in the following language: "If the jury believe all the evidence in this case they will find for the defendant."

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HEWITT, WALKER & PORTER for appellant.

SMITH & LOWE, *contra*.

STONE, C. J.—The Woodward Iron Company, appellant in this cause, was engaged in mining coal, as one line of its business. The coal was reached by a shaft sunk in the earth; and extending down the shaft were two lines of railroad track, over which the cars descended and brought up the coal. The cars were moved up and down the tracks by a steam engine, which was above ground, and stationary. The force was applied to the cars by means of an iron rope. The cars were let down empty, and drawn back loaded. There were rests, or stopping points, along the line of the shaft, styled in the testimony “lifts,” and at these “lifts” there were switches on the track, by which the descending cars could be turned off, or placed back on the track. These switches were so arranged and distributed up and down the shaft, as to be connected with the rooms or excavations, from which the coal was mined. There were also along the line of the shaft what are, in mining phrase, called “sumps”—rude wells or cisterns, in which the water in the mine was trained to collect; and from which it was pumped out of the mine by the steam engine which moved the cars in the shaft. One Harrison was the superintendent of the entire works, representing and performing the functions of the Iron Company, and Jones was an employee and laborer, under his direction. *Corcoran v. Holbrook*, 59 N. Y. 517; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240. The first “lift,” or rest on the line of the shaft, and first switch, were about seventy five yards below the surface, or entrance to the shaft. Above this switch, and near the entrance, was the first pump. Below the switch, some seventy five feet, was a “sump,” near the line of the track. A steam pipe extended down the shaft, through which hot steam passes from the engine. The business assigned to Jones was to superintend the switch, attach and detach cars, superintend the pump, and the cistern or “sump” in which the water collected. He had an assistant, a colored man under his control; but he was under the control of Harrison, the superintendent.

The present suit is for the recovery of damages of the Woodward Iron Company, for an injury alleged to have been suffered through the negligence of Harrison, its superintendent. The averment of the complaint on which the right of action is based is in the following language: “The plaintiff, being then and there, on, to wit, the 10th day of March 1884, a servant of the defendant, engaged in keeping said pumps in operation, and in attaching loaded cars to the train operated in said mines

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as aforesaid, was engaged in relieving the water pipes of said pumps of mud that had accumulated therein, and was obstructing the passage of water therein; and while so engaged at the place where he was obliged to do said work, was stricken by one of defendant's cars operated in said mine as aforesaid, and badly bruised and injured; and at the time plaintiff was stricken as aforesaid, he did not see the said car, and was unable to see and get out of the way of the same, in consequence of the steam that had accumulated in said tunnel or slope between him and the said cars. And the plaintiff avers that said steam had escaped from said steam pipe at a joint thereof, and that he had called the attention of the defendant to said joint, and that the same was out of repair, and the defendant had promised the plaintiff to have the same repaired at night when the said mines were not being operated, but negligently omitted to do so; and relying on the promise of the defendant, the plaintiff thereafter continued to perform his duties as aforesaid, and was injured as aforesaid." There was a demurrer to the complaint, assigning, among others, the ground that "there is no allegation that the defendant had had time to repair the same from said notice prior to the alleged injury." The court overruled the demurrer.

The demurrer raises the question squarely, what change, if any, is wrought in the *status* of the parties, by a notice given to the employer of a defect in the machinery, and his promise to have the same remedied. If the employee, after such notice and promise, remain in the service, is this an implied agreement on his part to take the risk on himself, or is the effect to continue or revive the liability of the employer, and to absolve the employee from the imputation of contributory negligence, springing out of the continued service? The authorities are overwhelmingly in favor of the latter of these propositions, at least, until a reasonable time elapses within which to make the repairs. Waiting such a reasonable time, it would seem, if the repairs are not made, the employee should quit the service, if perilous; and failing to do so, is it illogical to presume he agrees to incur the risk? And would he not thereby be guilty of proximate contributory negligence? We propound these inquiries with no intention of answering them, as this phase of the question is not raised by this record. Our purpose is to prevent a misinterpretation of our ruling. *Beach Contr. Neg.* § 140; *Holmes v. Clark*, 6 Hurlst. & Nor. 349; *S. C. 7 Id.* 937; *Snow v. H. R. R. Co.*, 8 Allen 441; *Patterson v. P. & C. R. R. Co.*, 76 Penn. St. 389; *S. C. 18 Amer Rep.* 412; *Kroy v. Chic. R. I. and P. R. R. Co.*, 32 Iowa 357; *Greenleaf v. Dub. & S. C. R. R. Co.*, 33 *Id.* 52; 2 *Thompson Neg.* 1010; *Buzzell v. L. Manuf. Co.* 48 Me. 113.

The City Court did not err in overruling the demurrer.

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We have stated above that the only negligence with which the defendant is charged was the failure to repair the defective joint in the steam pipe. The accident and consequent injury occurred about two days after the superintendent was notified of the defective joint. The testimony most favorable to plaintiff—his own testimony—shows the following state of facts at, and immediately preceding the injury: Plaintiff Jones and his colored assistant were at their post at the first lift and switch, and together went down to the sump. They found the sump full of water and overflowing—the nozzle of the hose connected with the pump above being so choked with mud, that the pump lifted no water. Plaintiff immediately set to work to clear the pipe of mud, and was thus engaged twenty or thirty minutes when the descending car struck him. Plaintiff while so engaged was standing on the track of the railroad, and must so stand to do the work. He knew that a car was above him, and was liable to come down at any moment. He knew the switch at the first lift was not turned, and if the car came down, it would follow, without obstruction, the line of the track on which he was standing until it reached him. While engaged in removing the mud from the nozzle of the hose, he sent his colored assistant up to the switch, but gave him no instructions to turn the switch, nor to intercept the descending car, unless there was a loaded car at the lift to be attached. The superintendent's instructions were, that a descending empty car was not to be stopped by turning the switch, unless there was, at the time and place, a loaded car to be drawn to the surface. There was no loaded car at the place. One in the shaft or slope, could ordinarily hear a descending car for a distance of seventy-five yards, and having a miner's lamp, could see it at a distance of seventy-five feet before it reached him. At the time of the accident there was such a noise in the shaft, not made by plaintiff, that he could not hear the approaching car; and the shaft was so choked with the escaped steam that he could not see the car until it got within three feet of him; but he did not know this until the car struck him. The record discloses no proof that the persons operating the engine, or any other, except plaintiff and his assistant, knew that anything was disordered at the sump, or that plaintiff was away from his post at the switch, and there is no proof that plaintiff gave any directions, or took any precautions to have himself notified of the approaching car. Plaintiff had been employed about the mine for some months, and in his present line of duty for three weeks. The defense made was that the plaintiff had, by his own negligence, contributed proximately to the injury he complained of.

In *Central R. R. & B. Co. v. Letcher*, 69 Ala. 106, this court,
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quoting from the language of Black, C. J., in *R. R. Co. v. Aspell*, 23 Penn. St. 147, said: "It has been a rule of law from time immemorial, and it is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured, concurring with that of the other party, no action can be maintained." So, in *Gothard v. Ala. Gr. So. R. R. Co.*, 67 Ala. 114, this court said: "When contributory negligence is relied on as a defense to an action for damages, it is not essential that the plaintiff should have been the cause of the injury; for if his negligence contributed proximately to an injury which he could have avoided by the use of ordinary care or diligence, he can not recover." In *Gonzales v. N. Y. & H. R. R. Co.*, 35 N. Y. 440, it was said to be "the duty of the injured party, who knew a train was just due, to look in the direction from which it should come, before attempting to cross the railroad track, and that if he omitted to do so, he was guilty of negligence which precluded a recovery." In *H. & Texas R'y Co. v. Fowler*, 56 Tex. 452—S. C. 8 Am. & Eng. R. R. Co., 504, it is said: "If the employee had the opportunity to observe the degree of danger attending the performance of the service, damages can not be recovered of the company on the ground that the latter knew the danger and the former did not." "When a servant is employed upon work which, equally within the knowledge of the master and the servant, is of a dangerous nature, the master is not liable for the consequences of an accident occurring to the servant in the course of that employment, unless through negligence on the part of the master, and the absence of rashness on the part of the servant."

In *Whar. Neg.* § 221, it is said to be the rule in this country "that a servant does not, by remaining in his master's employ, with knowledge of defects in machinery he is obliged to use, assume the risks attendant on the use of such machinery, if he has notified the employer of such defects, or protested against them, in such a way as to induce a confidence that they will be remedied. The only ground on which this exception can be justified is, that in the ordinary course of events the employee, supposing the employer would right matters, would remain in the employer's service; and that it would be reasonable to expect such continuance. But this reasoning does not apply to cases where the employee sees that the defect has not been remedied, and yet exposes himself to it. In such case, on the principles heretofore announced, the employer's liability in this form of action ceases. He may be liable for breach of promise; but the causal connection between his negligence and the

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injury is broken by the intermediate voluntary assumption of the risk by the employee." Whar. Neg., §§ 323-4; Beach Cont. Neg., §§ 64, 64, 140; Wood, Master and Servant, § 328; Cooley on Torts, 674; *Daniels v. Clegg*, 28 Mich. 52; *Tanner v. L. & N. R. R. Co.*, 60 Ala. 621; *Cook v. Cent. R. R. & B. Co.*, 67 Ala. 533; *Haley v. Earh*, 30 N. Y. 208.

Contributory negligence, like negligence itself, is a question for the jury, when the testimony is indeterminate, and anything is left to be inferred by the jury. It is a question of law, however, when the facts are clearly made known, and the course which common prudence dictates can be readily discovered. *M. & C. R. R. Co. v. Copeland*, 61 Ala. 376; *Cook v. Cent. R. R. & B. Co.*, 67 Ala. 532; *Ala. Gr. So. R. R. Co. v. Hawk*, 72 Ala. 112; *Fernandes v. Sac. Ry Co.*, 52 Cal. 45; *Flynn v. Kansas City &c. R. R. Co.* 47 Amer. Rep. 99; S. C. 98 Mo. 195; *Hough v. Railway Company*, 100 U. S. 2013; *Union P. Ry Co. v. Fray*, 15 Amer. & Eng. R. R. Ca. 158; S. C. Kansas; *McGrath v. N. Y. & N. E. R. R. Co.*, 18 Amer. & Eng. R. R. Ca. 5; *G. H. & San A. Ry Co. v. Drew*, 46 Amer. Rep. 261; 59 Tex. 10.

We need not deny, and do not decide the question, that, under the facts of this case, negligence on the part of Harrison, the superintendent, would be negligence of the Woodward Iron Company, and dealt with as such, *Fore v. Fitchburg R. R. Co.*, 110 Mass. 240; *Corcoran v. Holbrook*, 57 N. Y. 517; *Crutchfield v. R. & D. R. R. Co.*, 98 N. C. 300. According to plaintiff's testimony—and we are discussing this case as shown on his testimony alone—it is probable there was negligence in permitting the defective joint in the steam pipe to remain out of repair for two days after being notified of it. The real question presented is, whether there was proximate contributory negligence on the part of plaintiff. Carried to its extremest tension, the testimony fixes negligence on the corporation only in its failure to repair the leaky joint in the steam pipe. It not being shown that the persons above the surface and about the engine had any notice that the sump was out of order, or that Jones was away from the switch, or in any place of danger, no fault or negligence can be predicated of the single act of letting the empty car down the slope. Was there negligence on the part of Jones, the plaintiff? We think there was. He knew the car was above, and was liable to descend at any moment. He knew the switch was so set, that the car would descend to him on the very track he was standing on. He knew steam was escaping from the steam pipe, and must he not have known the shaft was being choked with it? Having with him his miner's lamp, by the light of which he was working, is it possible he would fail to observe the accu-

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mulation of steam or smoke, and consequent obscuration of his vision? If the noise was so great that he could not hear the approaching car, should he not have adopted some measure to avert the impending danger?

We are not, and can not be supposed to be cognizant of the details and wants of the service plaintiff was engaged in. Conceding that to relieve the nozzle of the hose of the mud accumulated in it, it was necessary that he should stand on the track of the railroad, this does not relieve him of the imputation of negligence in being there at the time he was injured. It would seem impossible for him to have been ignorant that the shaft was so filled with steam as to prevent his seeing the approaching car, situated as he was, and working by the light of his miner's lamp. He certainly could have abstained from standing on the railroad track, until danger was passed by the empty car passing down, or, he could have placed his negro assistant above him, to give him notice of the approaching car. And, notwithstanding his orders were not to stop a descending car, unless there was a loaded one ready to be carried back, he certainly would have felt authorized to disregard such order and stop the car, if the work at the sump was so pressing that it could not be delayed until the car passed below. Viewed in any light, the plaintiff was guilty of negligence which contributed proximately to the injury.

Applying the foregoing principles, charge No. five of those asked by defendant ought to have been given. Charge numbered two should also have been given, if it were not that one clause in the hypothesis has no evidence to support it. That clause is "If you believe, from the evidence in this case, that the plaintiff turned switch," &c. There is no evidence tending to show who turned the switch. This, even though immaterial, would justify its refusal. *Martin v. Brown*, 75 Ala. 442; *M. & E. Ry Co. v. Kolb*, 73 Ala. 396.

Reversed and remanded.

Moore v. Spier.

Contest of Will.

1. *Appeal; when dismissed.*—An appeal from a decree rendered on the contested probate of a will, taken within thirty days from its rendition, will not be dismissed on motion, because the citation was not served for several months after the appeal was sued out.

2. *Same; irregularity in waived by joinder in error.*—In such case,

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the appellee might, *it seems*, have had an affirmance on certificate, but the irregularity is waived by a joinder in error without objecting to it.

3. *Will; how attested.*—The attesting witnesses to a will are required to sign it in the presence of the testator (Code, § 2204), but not in the presence of each other.

4. *Undue influence; when burden on legatee or devisee to disprove.* Under the rule laid down by this court in former cases (*Waddell v. Lannier*, 62 Ala. 347; *Shipman v. Furniss*, 69 Ala. 564), when the principal devisee and legatee occupied a confidential relation to the testatrix, though related to her by consanguinity more distantly than the contestants, the burden of proof is on him to show that the will was not procured by fraud or undue influence.

5. *Sale of land devised, only revocation pro tanto.*—A sale of the land devised, subsequent to the execution of the will, while it might operate a revocation *pro tanto* of the will, would not invalidate it entirely, nor prevent its probate as to the other property embraced in it.

6. *Evidence as to mental condition of testatrix; when competent.*—Before a witness can be allowed to testify as to the mental condition of the testatrix, it must be first shown that his acquaintance had been so intimate, and had continued for such a length of time, as justified the formation of a correct judgment as to her mental *status* and habits.

7. *Same.*—While the proper inquiry is as to the mental *status* at the time the will was executed, evidence as to its condition at a former time is relevant; and when weakness of mind resulting from senility is urged against the will, it is competent for the proponent to adduce evidence showing that, subsequent to the date of the will, no appearances of imbecility were exhibited.

8. *Same.*—A witness, having knowledge of the facts, may testify that the testatrix was firm in her views and convictions, or, on the other hand, that she was capable of being easily influenced; but not that her character in the community was that of one easily influenced.

APPEAL from Wilcox Probate Court.

Heard before Hon. THOS. L. COCHRAN.

In the matter of the last will and testament of Elizabeth Savage, deceased, which was propounded for probate on the 11th April, 1884, by James P. Spier, the executor and principal beneficiary named therein. The probate of the instrument was resisted by Leonard Moore and other relatives of the testatrix upon the grounds or specifications hereinafter set out. The proceedings attacking the validity of the will were begun in the Probate Court, but subsequently transferred to the Register in Chancery on account of the incompetency of the presiding judge.

The grounds of contest embraced in the specifications or pleas filed by the contestants on the hearing before the register were, in substance, that the deceased was mentally incapable of making a lawful will at the time of its execution; that she was not "of sound mind and disposing memory;" that said supposed will was not executed in manner and form as required by law; that said supposed will was obtained by undue influence exerted by the proponent; and that the said will was obtained by the fraud of said James P. Spier. As shown by the bill of exceptions, which purports to set out all the evidence,

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the execution of the will on 14th May, 1866, was duly proven by the attesting witnesses. By its terms, almost her entire estate, after a few unimportant bequests to other relatives, was left to James P. Spier, the proponent, who was a cousin of the deceased, and was employed at the time and until her death in March, 1883, as a superintendent upon her place in said county. Numerous witnesses introduced by the contestants testified as to the mental capacity of Mrs. Savage; the substance of their testimony being that the testatrix was "childish" and subject to frequent spells of causeless weeping; that at times she was possessed by a hallucination that she was in a "starving condition;" and was somewhat addicted to the use of spirituous liquors, though the testimony was in conflict as to the extent of her indulgence in this habit. The contestants adduced other testimony as to peculiarities and eccentricities of the deceased, one of which was an indiscriminate habit of addressing acquaintances and strangers as "honey." Some of contestants' witnesses, however, testified that the deceased, at times, "had as good a mind as any woman" and was a "good business woman" and "not easily influenced." One of the witnesses introduced by the contestants testified that her mind "was very good in 1865 and 1866." The evidence adduced by the proponent to sustain the will tended to show that the testatrix was a woman of no little business capacity; that her indulgence in spirituous liquors was not immoderate; that the various peculiarities testified to by the contestants' witnesses resulted from an over affectionate disposition and not from mental weakness, and that she was not easily influenced by others. As further shown by the bill of exceptions, the contestants introduced in evidence a conveyance dated 10th October, 1867, by which the said Elizabeth Savage transferred to the proponent, for a recited consideration of \$9,673.00, certain lands located in Wilcox county, together with a number of mules, horses, and other personal property. The greater part of the property thus conveyed was substantially the same as that embraced in the will. The contestants requested the court to charge the jury: "That under the laws of Alabama, if the testatrix, after the making of her will, sold and conveyed, and before her death received the purchase-money for, the property so sold and conveyed by her, such sale and conveyance and payment of the purchase-money before her death, is a revocation of said devise, so far as the property so sold, conveyed and paid for is concerned." This charge the court refused to give, and the contestants duly excepted. For the purpose indicated in the opinion of the court, the contestants offered in evidence the will of John McCondie, the father of the testatrix, which contained the following: "Now while I wish my above named

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daughter, Elizabeth Savage, to enjoy life, *I am far from wishing a profligate use made of her portion*, and that it may not be, I wish it to be under the inspection of her brothers, Jay and John McCondie, but they are not at any time to take away, or deprive her of an economical use of this property during her life." To the introduction of this will, and to the introduction of the above clause thereof, the proponent objected; the objection was sustained by the court, and the contestants excepted. The contestants also reserved exceptions to the action of the court in refusing to allow Leonard Moore, one of contestants' witnesses, to be asked "whether or not he knew the condition of Mrs. Savage's mind in 1866;" and in permitting one Warren Thompson, a witness for proponent, to testify to the *general character* of Mrs. Savage in the community in which she lived "as to whether or not she was a woman easily influenced."

As recited in the bill of exceptions, "the court, in the general charge, charged the jury as follows as to what, in law, was an execution of a will: that if a will is in writing, signed by the testator, or by some one for him, in his presence, by his request, and attested by two witnesses in the presence of the testator, it is executed in the manner and form prescribed by law." To this charge the contestants excepted. The contestants further excepted to the refusal of the court to give the following charges, numbered respectively 12 and 15, which, with numerous others, were requested in writing: "If the jury believe, from the evidence, that the deceased was, at the time of the execution of said alleged will, an aged woman, and had a weak mind and memory, although she might not be legally incompetent to make a will, yet the will of such a person ought not to be sustained, unless it appeared that such disposition of property had been fairly made and emanated from a free will without the interposition of others." "The existence of confidential relations between the testatrix and legatee, or devisee, excites the suspicion and jealousy of the court, and casts upon the proponent of the will the duty of showing, by affirmative evidence, the testatrix's capacity, volition and free agency."

The assignments of error include the rulings above noted, with numerous others not necessary to be set out.

S. J. CUMMING, for appellants.

JONES & JONES, and JOHN Y. KILPATRICK, *contra*.

SOMERVILLE, J.—The motion to dismiss the appeal can not be sustained. It was taken within the thirty days allowed

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by the statute, so far as appears from the record. The notice or citation, it is true, was not served for several months afterwards, but this irregularity affected only the question as to when the appeal should stand for trial, and not the jurisdictional validity of the appeal itself, which became complete when it was prayed for and the requisite security given. *Willingham v. Howell*, 34 Ala. 680. The appellee, it may be, had his remedy for this delay by requesting a judgment of affirmance on production of the proper certificate from the court below. But this he did not do. The irregularity, moreover, was waived by the joinder in error without previously interposing the objection. *Mobile Mut. Ins. Co. v. Cleveland*, 76 Ala. 321; *Bolling v. Jones*, 61 Ala. 508; 1 Brick. Dig. 103, §§ 289-290.

The instruction of the court to the jury was free from all error so far as it defined what was requisite in law to the mechanical execution of a will. The statute requires wills, other than those that are *nuncupative*, to be "in writing, signed by the testator, or some person in his presence and by his direction, and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator." Code, 1876, § 2294. It is not required that the witnesses should sign in the presence of each other. *Hoffman v. Hoffman*, 26 Ala. 535.

The question of chief importance in the case is that of undue influence which is alleged to have been exerted by the appellee upon the mind of the testatrix in procuring the execution of the will in contest. It is not only proper but necessary for us to say, that we find no positive evidence in the record which tends to show the exercise of any influence, which is in its nature essentially fraudulent, involving, as it does, a resort to improper arts or circumvention, operating to induce one to confer a benefaction contrary to his deliberate judgment, reason, and discretion. Bigelow on Frauds, 288; 1 Redfield on Wills, 530. Hence many of the charges, which may be interpreted to assume the existence of such influence, were properly refused, because they were, for this reason, faulty and misleading.

It is made to appear, however, that a confidential relation existed between the devisee, Spier, and the testatrix at the time of the execution of the will, which was on the fourteenth day of May, 1866. He was her trusted agent, having the general management of her property and business, being employed at a stipulated salary payable by the year. Though a kinsman by consanguinity, he was not so nearly related to her as were some of the contestants. By great kindness towards the testatrix he had acquired an influence over her which, though it may not have been illegitimate, was very great. Mrs. Savage was about

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sixty-eight years of age at the time she executed the will, and was simple-minded, although not, perhaps, of strictly feeble intellect. Being occasionally addicted to drinking, she was sometimes of eccentric manners and apparently hysterical. The value of the property left by the will was about ten thousand dollars, being substantially all owned by the testatrix, except a few legacies, purely nominal in amount, left to other relatives.

Under the rule laid down by this court in *Shipman v. Furniss*, 69 Ala. 555, 564, and *Waddell v. Lanier*, 62 Ala. 347, the burden of proof, in our opinion, was cast on the devisee to show that the will in question was not superinduced by fraud or undue influence, but was the result of free volition on the part of the testatrix. We need not add anything more here by way of discussion to what is said in those cases, except that this rule as to the burden of proof is one of public policy, designed to prevent the abuse of certain confidential relationships, and to preserve them free from the taint of an overreaching selfishness.

The court, under the influence of this rule, should have given the twelfth and fifteenth charges requested by the contestants.

Conceding that the sale of the land to the appellee was a revocation of the will so far as the land itself was concerned, it would not invalidate the will *in toto*. The instrument might still be valid and operative as to the other property of the testatrix, and, if so, should be admitted to probate as to it. The twenty-fourth charge, failing to recognize this principle, was properly refused. *Taylor v. Kelly*, 31 Ala. 59; *Welsh v. Pounders*, 36 Ala. 668; Code, 1876, § 3287.

The other charges, bearing on the subject of undue influence, except the fourth, were abstract or otherwise misleading, and their refusal imputes to the court no error.

The witnesses, who were examined as to the condition of Mrs. Savage's mind at the time of making the will, should have been required first to show that their acquaintance with her had been sufficiently intimate and long to justify the formation of a correct judgment as to her mental *status* and habits. The rule on this subject is discussed at length in *Ford v. The State*, 71 Ala. 385; and will be a sufficient guide upon another trial.

The proper inquiry was, of course, the condition of the testatrix's mind on the day the will was executed. Its *status* before this period was relevant, however, because it may have continued in the same condition. So, one of the points urged being weakness of mind engendered by senility, it was competent to show that, subsequent to the date of the will, her mind was free from every appearance of imbecility.

It was competent to ask witnesses, who showed ample know-
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ledge of the facts, whether the testatrix was a woman firm in her views and convictions, or one capable of being easily influenced. This would be in the nature of a collective fact. But it was clearly erroneous to permit the witness, Thompson, to testify that her character in the community was that of one easily influenced. This was not a case where proof of character was admissible. It was an attempt to establish a substantive fact by public repute.

So the estimate in this particular, or any analogous one, in which she may have been held by McCondie, could not be proved by declarations made in the latter's last will, as was sought to be done by the appellants. This evidence was obviously hearsay, and was properly excluded from the jury.

The judgment of the probate court is reversed and the cause remanded.

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Bill in Equity for Partition of Lands.

1. *Partition; sale of lands for.*—It is well settled by the course of decisions in this State, that a court of equity is without jurisdiction to decree, for partition, the sale of land belonging to adult tenants, without their consent.

2. *Decree pro confesso; effect of.*—A decree *pro confesso* is an admission only of the allegations of the bill which are well pleaded; but, while such decree is an admission of the facts alleged, it is not an admission that the complainant is entitled to equitable relief, unless authorized by the allegations of the bill.

APPEAL from the Chancery Court of Elmore.

Heard before the Hon. N. S. GRAHAM.

This was a bill in equity filed on 28th February, 1884, by W. J. Johnson against Barbara, William and David Kelly for the purpose indicated in the opinion. The cause was submitted on decree *pro confesso*, on the original and amended bills, and exhibits thereto; and the chancellor caused a decree to be entered dismissing the bill, upon the ground that said court had "no jurisdiction or authority to sell the lands of adults for the purpose prayed for in the bill." The decree is here assigned as error.

WATTS & SON, for appellant.

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CLOPTON, J.—The object of the bill is to obtain a decree for the sale of lands to effect partition, on the ground that the same can not be equitably divided. All the defendants are adults, and a decree *pro confesso* on personal service was entered against them. While the jurisdiction of a court of equity to decree a sale of the real estate of infants for partition is settled by the course of decisions in this State, it is equally well settled, that the court is without jurisdiction to decree a sale of the lands of adult tenants for such purpose, without their consent. *Delony v. Walker*, 9 Por. 497; *Wilkinson v. Walker*, 74 Ala. 198; *Lyon v. Powell*, 78 Ala.

It is insisted, that the decree *pro confesso* is a consent. The bill does not aver consent, and none is disclosed by the record. A decree *pro confesso* is regarded as an admission of the allegations of the bill, which are well pleaded. The defendants are not thereby precluded to appear, and contest the decree on the merits of the bill. The court will only make such decree, as it would have made on the state of the pleadings, had there been no default, and the allegations of the bill had been proved. Code §§ 3824, 3826. *McDonald v. Mo. Life Ins. Co.*, 56 Ala. 468. 1 Dan. Ch. Pl. & Pr. 526. While a decree *pro confesso* is an admission of the facts alleged, it is not an admission, that the complainant is entitled to equitable relief, unless authorized by the allegations of the bill; and is not a consent that the relief prayed for may be granted.

Affirmed.

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Bill in Equity by Creditors to Set Aside Fraudulent Conveyance of Debtor.

1. *Conveyance by embarrassed or insolvent debtor to creditor; validity as against other creditors.*—A bona fide creditor, knowing that his debtor is embarrassed, or insolvent even, may use extraordinary haste in collecting his demand, to the extent of purchasing everything the debtor has, leaving nothing for other creditors; but he must pay a reasonably fair price for the goods or property purchased, and secure no benefit to the debtor which the law would not give him in the absence of the contract.

2. *Same.*—In this case, the creditor's demand being \$5,700, and he purchasing the debtor's entire stock of goods at the gross sum of \$6,200, of which he paid \$1,000 in cash, leaving \$500 of his debt unsatisfied; these facts bring the case within the principle settled in *Lery v. Williams*, 79 Ala. 171, and stamp the transaction as fraudulent.

3. (*On application for rehearing.*) *Recital, in conveyance, of partner-*
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ship of husband and wife, the grantors : coverture of wife no obstacle to decree condemning partnership property.—The complainants suing as creditors of the mercantile partnership of S. A. M. & Co., alleged to consist of S. M. and his wife, and seeking to set aside, on the ground of fraud, a sale and conveyance of their entire stock of goods by said partnership; the bill of sale, which was made an exhibit to the bill, and in which the partnership was described as consisting of the husband and wife, is sufficient proof of the fact of partnership, as against the unsworn answers of the defendants, averring that the business belonged to the wife alone; and the fact of the partnership being established, the coverture and incapacity of the wife, one of the partners, is no obstacle to the decree condemning the goods as the property of the partnership.

APPEAL from the Chancery Court of Tuscaloosa.

Heard before the Hon. THOMAS COBBES.

The original bill in this case was filed 30th May, 1881, by Leinkauff & Strauss, and others, as creditors at large of S. A. Myer & Co., an alleged mercantile partnership formerly engaged in business at Tuscaloosa, Alabama, composed of Solomon Myer and his wife, Sarah A. Myer, against the said S. A. Myer & Co. and Louis Frenkle, who was engaged in business at Mobile, Ala., under the firm name of Louis Frenkle & Co. The complainant creditors sought to set aside, as fraudulent, a conveyance of personal property, executed January 10th, 1881, by said Solomon and Sarah A. Myer to the said Louis Frenkle & Co., by the terms of which conveyance, a copy of which was made an exhibit to the bill, the entire stock of goods, wares and merchandise then in the store of the said S. A. Myer & Co., together with all the notes, liens, accounts and bills receivable held by them, were transferred to the said Louis Frenkle & Co. for a recited consideration of \$6,200 in money—"a large part of said sum of money consisting" as recited in this instrument "in indebtedness due from the said S. A. Myer & Co. to the said Louis Frenkle & Co. for actual cash advances made to said S. A. Myer & Co. in the year 1880." The bill averred the creation and existence of the debts due the several complainants; and charged that the consideration recited in said conveyance was wholly, or in large part, simulated and fictitious; that the cash advances made to said S. A. Myer & Co., if such advances were actually made, fell far short of the amount specified in said conveyance; that said pretended sale, though purporting on its face to be absolute and unconditional in its terms, was coupled with a fraudulent agreement or understanding and secret trust, and was executed in pursuance of a fraudulent and collusive arrangement designed to enable the said Louis Frenkle & Co. "to receive a preference in the payment of their claim against said S. A. Myer & Co. by hindering and delaying other creditors, after

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payment thereof, and in consideration thereof, to return the surplus to said S. A. Myer & Co., or pay over the same upon their order, and that said Solomon Myer should be retained in said store as a clerk for excessive wages and get his supplies therefrom, and derive other benefit from said pretended sale to the hindering, delaying and defrauding of complainants and other creditors of said S. A. Myer & Co." The bill further alleged that no schedule or inventory was attached to said conveyance; that said conveyance embraced substantially all the available assets of said S. A. Myer & Co., who were insolvent at the time, and whose fraudulent purpose in its execution was known to and participated in by their co-defendant. Touching the disposition of the stock and management of the business of said S. A. Myer & Co., subsequent to the transfer to Frenkle, the bill contained the following allegations:

"Par. 7. Complainants further show that there has been no change in the place of business of said S. A. Myer & Co., but that the same house used by them is now used by said Louis Frenkle & Co., and the goods pretended to be sold have remained in said house, and the said store has been kept open, and the business continued to all appearance as it was carried on by said S. A. Myer & Co. before the pretended sale aforesaid, and the same sign-board, with the same sign of S. A. Myer & Co., has continued unchanged, and the said Solomon Myer, the husband of said Sarah A. Myer, has continued in said house as salesman, and with the same apparent powers, rights and duties exercised by him before said pretended sale without any change whatever in the mode, manner, custody, or the persons who managed and conducted the business of said S. A. Myer & Co. That said Solomon Myer falsely pretended, and has falsely pretended since said simulated sale, that he is now, and has been, the mere clerk of said Louis Frenkle & Co., and that he is working for him on wages as a mere clerk or salesman." The bill contained other allegations, not necessary to be noted, of facts and circumstances indicating the asserted fraudulent character of the conveyance, and prayed that the same be vacated and annulled; and that said Louis Frenkle be charged with the value of the property which came to his hands by virtue of said conveyance; and that the same, and the proceeds thereof, be subjected to the payment of the demands of complainants.

Answers were filed by all the defendants specifically denying the imputed fraud and asserting the *bona fides* of the transfer to Frenkle. Both Solomon and Sarah A. Myer deny that they were partners, the former's connection with the business of S. A. Myer & Co. being stated as that of agent, merely, for his wife, who transacted business under the firm name of

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S. A. Myer & Co. The said Solomon Myer averred that his employment as clerk by Frenkle, after the transfer, constituted no part of the consideration thereof, and that said employment was accepted by him in good faith, as a means of earning a livelihood; and that he derived no benefit from said business other than his compensation as such clerk. In his answer to the bill, the defendant, Frenkle, averred that the sale in question was unconditional and effected in good faith to secure the payment of an indebtedness due him from said S. A. Myer & Co. of \$5,740.72 for cash advances actually made said firm between designated dates; that the difference between this sum and \$6,200 (the consideration recited in the bill of sale) "was paid to S. A. Myer & Co. at the time of said sale or shortly after." However, in his deposition, the said Frenkle states that he "bought the stock for \$5,200 and placed it to the credit of" Meyer, and "I bought the notes, books and accounts for \$1,000, for which I gave my firm's note at ninety days. This note was paid at maturity, but I do not know who held the note when it was paid."

The evidence adduced was voluminous, and it is not necessary to an understanding of the opinion that it should be here summarized. Upon final hearing, upon pleadings and proof, the chancellor was of opinion that complainants were not entitled to the relief sought, and caused a decree to be entered dismissing the bill. This decree is here assigned as error.

VANHOOSE & POWELL, for appellants.

WOOD & WOOD, *contra*.

STONE, C. J.—The sale of S. A. Myer & Co. to Frenkle was certainly gotten up and consummated in very great haste, and without those preliminary formalities which usually attend so grave transactions. To purchase, at a large gross sum, a stock of merchandise, entire, then being sold at retail, and with it all the unpaid dues, including notes and accounts, of the amount or availability of which the purchaser could have no personal knowledge; and this in a few brief hours, and solely on the representation of the seller as to quantity and value, certainly betrays a blind confidence, or recklessness, rarely met with in commercial circles. Add to this the pretended ignorance of Frenkle, the purchaser, that Myer, the seller, was insolvent, or in failing circumstances. Viewed in the most charitable light, there are many suspicious circumstances attending this transaction.—*Delaware v. Ensign*, 21 Barb. 85; *Griswold v. Sheldon*, 4 Comst. 580. Still, although Myer & Co. may have been insolvent, and that fact fully known to Frenkle, if

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the latter was a *bona fide* creditor of the former, the law authorized him to use extraordinary haste in collecting his demand, even to the extent of purchasing everything Myer owned; thus leaving nothing for the other creditors. The limitations on this right are, that in purchasing as a means of collecting his own demand, he shall pay a reasonable, fair price for the goods or property received in payment, and that he shall, by the contract, secure to the vendor no benefit, which the law would not secure to him in the absence of the contract. He must not go beyond the permissible purpose of securing his own demand.—*Crawford v. Kirksey*, 55 Ala. 282; *Lehman, Durr & Co. v. Kelly*, 68 Ala. 192; *Lipscomb v. McClelland*, 72 Ala. 151; *Meyer v. Bromberg*, 74 Ala. 524; *Hodges v. Coleman*, 76 Ala. 103; *Levy v. Williams*, 79 Ala. 171.

The so-called firm of S. A. Myer & Co. consisted alone of Mrs. S. A. Myer. The testimony of Frenkle (and it is not contradicted) shows that Mrs. Myer—S. A. Myer & Co.—was indebted to him, Frenkle, balance of account, in the sum of fifty-seven hundred dollars. The merchandise and bills receivable were estimated and purchased by Frenkle at the sum of six thousand two hundred dollars. Of this sum five thousand and two hundred dollars were credited on the indebtedness to Frenkle. The remaining sum—nine hundred or one thousand dollars—was paid by Frenkle to Myer, either in cash, or in notes afterwards paid. The bill of sale shows the sale of merchandise and bills receivable was one entire and single transaction, for a gross sum. There is nothing in the pleadings or testimony which shows, or tends to show, that Myer, or Mrs. Myer, had any right or claim to any part of the property sold, which exempted it from liability for their debts. The facts and circumstances in evidence force us to the conclusion that Frenkle, when he made the purchase, knew S. A. Myer & Co. were unable to meet their liabilities, and, in fact, were insolvent. Now, if Myer, when the trade was being negotiated, demanded the payment of nine hundred or one thousand dollars as a condition of making the sale, this was an additional notice to Frenkle, which should have put him to careful inquiry. And if this money payment was not required by Myer as a condition of the sale, why did Frenkle pay him so much money, and leave a balance of over five hundred dollars of his own claim unsatisfied? He went beyond the permissible purpose of securing payment of his own demand, and enabled Myer to defraud his other creditors. The case falls within the principle settled in *Levy v. Williams*, *supra*.

The decree of the chancellor is reversed, and a decree here rendered, granting to complainants relief.

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It is therefore ordered and decreed that the bill of sale and conveyance made by Solomon Myer and Sarah A. Myer to Louis Frenkle & Co.—bearing date January 10th, 1881,—Exhibit A. to the bill,—be set aside as fraudulent, and held for nought. And a reference to the register is ordered, requiring him to state an account, showing the several amounts due the several complainants, with interest to the coming in of the report. Also, the value of the merchandise and bills receivable, transferred by Solomon and Sarah A. Myer to Louis Frenkle & Co., with like interest.

In taking the account, he will consult the admissions in the pleadings, the testimony on file, and any other legal testimony that may be offered. He will report his findings to the Chancery Court. All other questions are reserved for the chancellor's ruling.

Reversed and remanded.

[NOTE BY REPORTER.—In response to an application for a re-hearing, filed by counsel for appellee, the following opinion was delivered:]

STONE, C. J.—It is urged before us, as a ground for re-hearing, that Mrs. S. A. Myer was the sole member of S. A. Myer & Co.; that she has been all the while a married woman, and, being such, she was incapable of making a binding contract for the payment of money.—*Dreyfus v. Wolfe*, 65 Ala. 496; *Cook v. Meyer*, 73 Ala. 580. From this premise, it is contended, that the complainants in this suit, showing themselves to be creditors of S. A. Myer & Co., can only claim to be creditors of Mrs. Myer, and she not being bound by any promise she may make, complainants have failed to show themselves creditors by any lawful demand which can give them a standing in court.

The bill is filed against S. A. Myer & Co., composed of Solomon Myer and Sarah A. Myer, his wife. It proceeds against them as partners, and seeks to condemn only the merchandise and effects, which had been of the firm effects of S. A. Myer & Co., and which it avers had been fraudulently disposed of. Sworn answers to the bill were waived, and the answers were put in without oath. The answers deny that Solomon Myer was a member of the firm, and set up that S. A. Myer, the wife, was trading alone, employing the name S. A. Myer & Co. The bill of sale, or conveyance, by which the merchandise and effects were conveyed to Louis Frenkle, is made an exhibit to the bill, and is a part of the record. That conveyance is in the following language: "This agreement of purchase and sale, made this 10th day of January, 1881, by and between Sarah A. Myer and Solomon Myer, of the firm of

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Sarah A. Myer & Co. of the county of Tuscaloosa in said State, and Louis Frenkle, composing [the firm] of Louis Frenkle & Co. of the city of Mobile, witnesseth," &c. This is the only evidence found in the record bearing on the question of the constituent membership of the mercantile house of S. A. Myer & Co. Neither Solomon Myer nor S. A. Myer was examined as a witness in this cause. This evidence, un rebutted and unexplained, is sufficient *prima facie* proof that Solomon Myer, and S. A. Myer, his wife, were partners, doing business in the name of S. A. Myer & Co.

In a proceeding against a firm or partnership, to subject partnership effects to the payment of a partnership liability, it is no defense that one of the partners was a married woman at the time the liability was incurred. The firm, and the firm effects are liable, notwithstanding some of the partners were not *sui juris*.—*Yarbrough v. Bush*, 69 Ala. 170.

The application for a rehearing must be overruled, and the decree heretofore rendered adhered to.

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Bill in Equity to Establish Resulting Trust and Remove Cloud on Title.

1. *Resulting trust ; when arising ; may be established by parol evidence.*—A resulting trust arises, by operation of law, in favor of the person who advances the purchase-money of land, though the title be taken in the name of another ; or in favor of the person for whom it is advanced by way of loan, the title being taken in the name of the lender as security for its repayment ; and this trust, not being within the statute of frauds (Code, § 2199), may be established by parol evidence.

2. *Same.*—The court analyzes the evidence in this case, and holds, as the chancellor held, that the writings fully establish a resulting trust, notwithstanding irreconcilable conflicts in the testimony of the parties.

3. *Purchase with notice of facts out of which resulting trust arises.*—A purchaser of the land from the party in whose name the title is taken, having notice of the facts out of which the resulting trust arises, can not claim protection against it.

4. *Offer to do equity ; what sufficient.*—An offer in the bill to do equity, by paying the money advanced with interest, is sufficient, when it is shown that a prior offer or tender would have been useless, the defendants repudiating the trust sought to be enforced against them.

APPEAL from Jefferson Chancery Court.

Heard before Hon. THOMAS COBBES.

This was a bill in equity exhibited on 4th March, 1882, by George C. Kelly against Horatio B. Tulane and Louis A.

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Bates, and alleged, in substance: That on a specified date complainant entered into an oral contract with H. B. Tulane, whereby said Tulane was to advance to complainant, as a *loan*, the sum of \$4,050.00 to be expended by complainant in the purchase of a lot in the city of Birmingham and the erection thereupon of a suitable storehouse to enable said George C. Kelly to carry on a hardware business; that complainant was to be allowed from one to five years for the repayment of the amount borrowed, which, meanwhile, was to bear interest at the rate of eight *per centum per annum*, payable in quarterly annual installments; that complainant was to have all benefit of enhanced value of the property and make good to Tulane all loss resulting from its depreciation; that having full confidence in said H. B. Tulane (he being the uncle of complainant's wife), the said Kelly purchased from G. H. Gibson the lot in question for a designated amount, and in order to secure the payment of the money borrowed by complainant, the conveyance was executed directly to said Tulane from said Gibson, and the deed, a copy of which was made an exhibit to the bill, delivered to Tulane *as security* for the repayment of the loan. The bill further alleges that complainant erected on said lot a commodious brick store-house, of which he has had continuous possession carrying on the hardware business therein profitably, and that said lot and improvements have enhanced in value fifty or seventy-five *per cent.* and are daily enhancing in value; and that complainant has complied with his undertaking by paying said interest installments as they fell due. The bill further averred that "about the 19th day of August, 1881, Louis A. Bates, a brother-in-law of said George A. Kelly, and nephew of said Tulane, visited the city of Birmingham, Ala., and went from there to Wetumpka, Ala., where said Tulane resides, and falsely and fraudulently represented to him that said George C. Kelly wished him (said Tulane) to convey said property to him (said Bates,) and under the influence of such false and fraudulent representation, obtained the conveyance of said Tulane to him, conveying said property to him (said Bates); and the said Bates paid (it seems) said Tulane a part of the purchase money for said property, and gave him a mortgage on said land and improvements to secure the balance"—which conveyances were duly recorded, copies thereof being appended to the bill as exhibits. The bill concludes with an offer of complainant to do equity in the premises and offers "to bring into court all the money borrowed by him of said Tulane and interest, to pay up such borrowed money as before stated," and prays that the legal title in said lot of land, &c. be divested out of said L. A. Bates and invested in complainant; that the deed of Tulane and the mortgage of Bates

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to Tulane be declared null and void and cancelled as clouds upon complainant's title; and that said Tulane be required, upon payment to him of the borrowed money, with interest thereon, to make complainant a proper conveyance "freed of said fraudulent conveyance above stated." The defendants demurred to the bill, assigning, *inter alia*, as grounds of demurrer: The statute of frauds: that the bill contained no averment that respondent, Bates, purchased the property in controversy from said H. B. Tulane with knowledge of the alleged equities of complainants in said property; and that the averments of said bill showed that the complainant had not paid into court the amount due said Tulane with interest thereon. The chancellor overruled the demurrers, and answers were filed by each of the defendants. H. B. Tulane, answering the bill, denied that a *loan* was contemplated by him when he advanced to complainant the money used in the purchase of the lot, and the erection of the improvements thereon, and averred the following to be a "true statement" of the facts in relation to said purchase: "On or about the first day of November, 1880, one Jared Bates, the brother-in-law of this respondent, and the father-in-law of the complainant, being desirous of assisting the complainant and his wife, the daughter of said Jared Bates, proposed to this respondent that if he would furnish the money and buy a business lot in the said city of Birmingham, and build a store-house thereon, and would permit the complainant to occupy the said store, as a tenant of this respondent, at an annual rental of eight per cent. upon the actual cost of said lot and store-house, with the joint and not several privilege upon the part of said Jared Bates and his wife, Artemese Bates and George C. Kelly of buying the said lot and store-house, at any time within the five years, by paying to this respondent the actual cost thereof, then the said Jared Bates and his wife would execute to this respondent a mortgage upon a house and lot owned by the said Jared Bates in Wetumpka, Elmore county, Alabama, for the value of said house and lot, which should be held by this respondent, as an indemnity against any loss that he might sustain by reason of the depreciation in value of the house and lot in Birmingham, Alabama." The respondent, Tulane, further alleged that, relying upon the promise of said Jared Bates to indemnify him by mortgage, as proposed, he bought the lot in controversy and erected upon it the brick store house; that said George C. Kelly's connection with the purchase of said lot and the erection of the said improvements was merely that of *agent* for respondent; and "under the terms of the said agreement with said Jared Bates, the said Kelly was to occupy the said store house as the tenant of this respondent at the rental afore-

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said; and to have jointly with Jared Bates and Artemese Bates the right to purchase said house and lot in the city of Birmingham as aforesaid; but the complainant was in no event to have severally and alone any such right." The said Tulane admitted writing the letter appended to complainant's bill as "Exhibit A," (the material portion of which is copied in the opinion), but alleged that said letter referred to the agreement that had been made with said Jared Bates; that said Bates and wife declined to execute to respondent the mortgage which they had agreed to execute as aforesaid; that thereupon respondent became dissatisfied with his purchase and sold and conveyed said lot to his co-defendant, L. A. Bates, and that said sale was not induced by any fraudulent representation on the part of said Bates. The defence presented by the answer of respondent, Bates, was practically identical with that of said Tulane. Upon final hearing, on pleadings and proof, the chancellor was of opinion that the evidence adduced (which was voluminous and contradictory) sustained the allegations of complainant's bill, and caused a decree to be entered granting the relief prayed. The character of the evidence is sufficiently indicated by the opinion. The receipt therein referred to, omitting the signature, is in the following language: "Received of George C. Kelly, eighty one dollars in full payment of first quarter's interest on purchase money for property occupied by him as a store and residence up to August 1st, 1881."

The overruling of defendant's demurrers and the decree rendered, are here assigned as error.

HEWITT & WALKER, and THOS. H. WATTS, SR., for appellants.

JOHN T. TERRY, *contra*.

SOMERVILLE, J.—It must be admitted that, if Tulane advanced the money in controversy to the complainant, Kelly, by way of a loan, and had the title of the land, which was purchased with it, taken to himself as security for its payment, he would hold the property upon a resulting trust for Kelly, and upon the repayment of the amount, would be compelled to convey, so far as he himself is concerned.—*Rose v. Gibson*, 71 Ala. 35; *Boyd v. McLean*, 1 John. Ch. 582; *Lehman v. Lewis*, 62 Ala. 129; *Perry on Trusts*, § 133; *Walker v. Elledge*, 65 Ala. 51; *Rhea v. Tucker*, 56 Ala. 450. Such a trust, being one which results by implication or construction of law, does not fall within the provisions of the statute of frauds, and may be established by parol evidence.—Code, 1876, § 2199; *Harden v. Darwin*, 66 Ala. 55.

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The question of fact, then, presented is, was the money used in purchasing the land invested for and on account of Kelly, or was he acting merely as an agent for Tulane in making the purchase. There is an irreconcilable conflict in the testimony on this point, and the finding of the chancellor is in favor of the complainant Kelly. It is our opinion that his conclusion is correct. The parties litigant are closely connected by affinity, and the litigation originates in a family disagreement. The oral testimony bears the natural and customary impress of these vitiating influences. We give more weight, therefore, to the written memoranda which seem to have passed between Tulane and Kelly, touching the subject. In a letter written by the former to the latter, bearing date May 13th, 1881, and referring to their previous oral agreement, he says: "I am to give you one to five years to pay for the property in, you to pay me 8 *per cent. interest*, quarterly, on \$4,050; I to give you all the *benefit of advance* in the property, and you to *make all losses good*, if any." On the first of August, 1881, after Kelly had been in the occupancy of the property for several months, he paid Tulane the first installment under his agreement, and took from him the following receipt: "Rec'd of Geo. C. Kelly eighty-one dollars in full payment of first quarter's *interest on purchase money* for property occupied by him as a store and residence."

The real estate in controversy is situated in the city of Birmingham. It is shown that the lot was bought and the storehouse upon it constructed by Kelly for his own use and occupancy as a merchant. It is no where denied that it was purchased especially for this purpose. It may be that Jared Bates, the father of complainant's wife, as is alleged, agreed to give Tulane a mortgage on certain property in Wetumpka to indemnify him against loss, but this, we think, was done entirely in the interest of complainant, who was intended to be the sole beneficiary of the transaction. The fact that he refused to give the mortgage after the money was advanced was immaterial. The promise was verbal and was not binding upon him in law, and his failure to perform it did not operate to revoke a loan already made to Kelly, or to change its nature.

The letter and receipt of Tulane are utterly inconsistent with the theory that the money was invested on his own account. It is perfectly and naturally reconcilable with the idea that it was designed as a loan to Kelly, who was the husband of his niece. The payment made is described in both writings as a payment of *interest* on the money. Kelly is to have the benefit of any advance in price, and to make good any depreciation in the value of the property below the price paid for it; and he is to have the right to redeem the property within

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five years by paying the amount advanced with eight *per cent.* interest, quarterly. The fact that Kelly executed no note or obligation for the money weighs but little in view of the important incident that he had already vested the legal title of the property in Tulane by the conveyance from Gibson, as he alleges, by way of security. The terms of these writings do not harmonize with the view insisted on by defendant's counsel, that Tulane was the real owner of this property, and intended merely to rent it to Kelly. We can discover no element of a lease in the transaction. The chancellor has found that Tulane held the property in trust for the complainant, and as a security for the payment of the money loaned, with interest at the rate stipulated in the written memoranda, and we fully concur with him in this conclusion.

The testimony leaves no room whatever to doubt that the defendant, Louis A. Bates, purchased the property with full information as to complainant's equity in it. He can not, therefore, be protected as a *bona fide* purchaser for value without notice.

The offer in the bill to do equity is sufficient, a good and proper excuse being shown for not having made a tender of the amount, admitted to be due, prior to the filing of the bill. It is made clearly to appear that Tulane had conveyed the property to Louis Bates, and that each of them repudiated the claim set up to it by the complainant. The offer would have been fruitless, and the law never requires the performance of a nugatory act.—*Robbins v. Battle House Co.*, 74 Ala. 499; *Willard's Eq. Jur.* 297; *Elliott v. Boaz*, 9 Ala. 772.

We discover no error in the decree of the chancellor, and it is accordingly affirmed.

Burford, Adm'x, v. Steele.

Bill in Equity by Creditor to Vacate and Set Aside Fraudulent Conveyances of Debtor's Property.

1. *Bill to set aside fraudulent conveyance; when not multifarious.* Under the rule against multifariousness, several distinct matters wholly unconnected, or several defendants against whom the complainant asserts separate demands, the case of each defendant being entirely distinct in its subject-matter from that of the others, can not be joined in the same bill; but, in the application of this rule to particular cases, the court necessarily exercises a discretion, endeavoring to avoid a multiplicity of suits, on the one hand, and not to involve a party in oppressive and expensive litigation in which he has no interest, on the other.

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2. *Same*.—Where a ward has obtained a decree against his guardian on final settlement, he may maintain a bill against the surviving surety on the guardian's official bond, jointly with the personal representative of the deceased surety, to enforce satisfaction out of their property; and the surviving surety having executed two mortgages on his property, on successive days, both mortgagees may also be joined as defendants, under allegations of fraud and want of consideration.

3. *Infants not included in the statute of non-claim*.—Infants are not included in the statute of non-claim (Code, § 2598), but they are allowed eighteen months after attaining majority to present their claims; and the fact that an infant has a guardian, who may and should act for him, does not exclude him from the benefit of this exception.

4. *Fraud; when averment of, sufficient*.—While a general charge of fraud, without a statement of the facts on which it is founded, is not sufficient, it is not necessary that all the facts and circumstances shall be minutely alleged; a general averment of facts from which, unexplained the conclusion of fraud arises, is sufficient.

5. *Averment of facts; when not multifarious*.—The averment of facts as to a distinct matter, as to which no relief is prayed, does not make a bill multifarious.

APPEAL from Wilcox Chancery Court.

Heard before Hon. S. K. McSPADDEN.

The bill in this cause was filed on 3d March, 1885, by David Steele against John R. McDowell, Daniel S. Pritchett, Mrs. Harriet McDowell and Mrs. M. Burford, administratrix of P. D. Burford, deceased, for the purpose indicated in the opinion. The chancellor overruled demurrers interposed by the defendants to the bill, and his decree is here assigned as error. The case made by the bill, and the grounds of demurrer, are sufficiently stated in the opinion.

JONES & JONES, S. J. CUMMING, and J. N. MILLER, for appellants.

JOHN Y. KILPATRICK, *contra*.

CLOPTON, J.—The general rule relating to multifariousness, forbids that several and distinct matters, wholly unconnected, or that defendants against whom the complainant asserts separate demands, the case of each defendant being entirely distinct in its subject-matter from that of his co-defendants, shall be joined in the same bill. The application of the general rule to a particular bill must be regulated in exercising a discretion necessarily allowed to the courts, by the purposes,—to avoid a multiplicity of suits on the one hand, and involving a party in oppressive and expensive litigation, in which he has no interest, on the other. The complainant, having obtained a decree against his guardian on a settlement of his accounts, brings the bill to recover the amount of the decree from the sureties on his official bond. The decree was rendered March

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13, 1884. On the next day, McDowell, one of the sureties, executed to Pritchett a mortgage on all his real estate to secure a recited debt of \$7,000.00; and on the succeeding day, he executed another mortgage on the same real estate to his wife to secure a recited debt of \$6,674.28. Both mortgages are assailed as fraudulent, and the mortgagor, and both mortgagees are made defendants. To join as defendants, in bills of this character, persons claiming different portions of the debtor's property under separate conveyances, is a common practice, sanctioned by the courts in the interest of convenience, and of doing complete justice. A bill by a creditor, to vacate and set aside several conveyances as fraudulent, was held not to be multifarious, though the conveyances were to different parts of the debtor's property, executed to different persons and at different times.—*Russell v. Garrett*, 75 Ala. 348; *Lehman v. Meyer*, 67 Ala. 396. Also, where lands were sold in different lots under a decree of the Probate Court, and purchased by different persons, it was held, that all the purchasers may be made defendants to a bill, seeking to declare a trust in the entire lands.—*Holt v. Wilson*, 75 Ala. 58. The bill has a single purpose—the satisfaction of the decree from the property of the sureties. The equitable right of action arises from the necessity to the consummation of this purpose, of setting aside the mortgages, and removing them as a cloud on the title, and an obstruction to an adequate sale of the lands. If the titles of the mortgagees be regarded as separate, they only constitute separate interests in the questions growing out of the subject-matter of the suit, and single object of the bill. In such case, the complainant will not be compelled to resort to two suits to determine his right to have the property sold, unincumbered by either or both mortgages, in satisfaction of his decree.

It is further contended, that the bill is multifarious, for the reason that the administratrix of Burford, one of the sureties, is joined as a defendant with the other surety and his mortgagees. The suit is brought to enforce a joint and several liability. The sureties have a community of interest in the subject-matter of the suit. Each is interested in defeating the claims of complainant, and if unable to defeat it, in the other surety being required to pay his proportion of the liability, thus saving the trouble and expense of a new suit for contribution. If it be conceded, that the demand against the estate of the deceased surety is a legal demand, his personal representative is a proper party to a suit in equity on the bond, and the court having rightfully obtained jurisdiction, founded on an equitable right of action against the other surety, will proceed and determine the rights, equities and liabilities of all the

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parties connected with the joint claim asserted by complainant. Under such circumstances, the case of either defendant is not entirely separate and independent of that of the other defendants in respect to the subject-matter.

The statutory requirement, that claims against the estate of a deceased person must be presented within eighteen months after the same have accrued, or after the grant of letters of administration, does not apply to minors, who are allowed eighteen months after the removal of the disability to present the claim. Code, § 2598. The fact that the minor has a guardian does not exclude the claim from the benefit of the exception. *Moore v. Wallis*, 18 Ala. 458. The exception would be nugatory in many cases, if the failure of a guardian to present a claim, arising from his *devastavit*, against the estate of a deceased surety on his official bond, operated to bar the claim. The claim was presented in less than eighteen months after complainant attained his majority.

The bill alleges, substantially, that McDowell did not and does not owe the mortgagees, as recited in their respective mortgages; that they were made for the purpose of hindering, delaying or defrauding complainant, and to screen and protect the mortgagor from the payment of the decree; and that all the parties "were each and all alike cognizant of all the facts, and the true situation in the premises" when the mortgages were made. It may be that the facts, out of which the conclusion of fraud is supposed to arise, might have been more directly and fully alleged. But the allegations are sufficient to notify the defendants, that the *bona fides* of the indebtedness is assailed, and to put in issue the validity of the mortgages. While the general charge of fraud is insufficient, the rule of certainty in pleadings in equity does not require that the facts and circumstances shall be minutely alleged. General averments of facts, from which, unexplained, a conclusion of fraud arises, are sufficient.—*Pickett v. Pipkin*, 64 Ala. 520.

While the bill states the facts relating to the note made by the deceased surety, payable to the guardian, and its presentment against his estate, complainant asserts no claim to the note and asks no relief respecting it.—*Juzan v. Toulmin*, 9 Ala. 662.

Affirmed.

Fouche v. Swain.

Bill in Equity by Junior Mortgagee for Sale of Lands and Cancellation of Prior Incumbrances thereon.

1. *Bill to redeem by junior against senior mortgagee.*—A bill to redeem, filed by a junior against a senior mortgagee, is a recognition of the validity of the older mortgage, and must offer to pay the amount due on it.

2. *Mortgage filed in office of probate judge; when operative as record.* When a mortgage is filed for record in the office of the probate judge, it is "operative as a record from the day of the delivery to the judge" (Code, § 2149), and not from its subsequent registration.

3. *Compromise of suit to foreclose mortgage; effect of.*—A suit to foreclose a mortgage being compromised by agreement of the parties, and an absolute deed executed to the mortgagee, although this can not affect the rights or equities of a junior mortgagee, it does not impair the lien or equitable rights of the senior mortgagee.

APPEAL from Talladega Chancery Court.

Heard before Hon. N. S. GRAHAM.

This was a bill in equity exhibited on 9th November, 1881, by Robert T. Fouche against Ebenezer J. Swain and others, its allegations presenting substantially the following case: Prior to the 14th day of January, 1869, the respondent, Swain, had purchased various tracts or parcels of land in said county with moneys belonging to the statutory separate estate of his wife, Margaret W. Swain, taking the titles in his own name. On said 14th January, 1869, the entire realty thus acquired was sold and conveyed by Swain and his wife to John T. Prior, a resident of Polk county, Georgia, for the consideration of \$8,600, of which amount \$2,000 were paid in cash on the 20th day of said month, when the conveyance was proved and recorded. To secure the deferred payments the said Prior executed, contemporaneously with the conveyance to himself, a deed of trust in favor of Mrs. Swain, to her husband, the said E. J. Swain, as her trustee, on all the lands embraced in their deed to him. On the 26th day of April, 1869, the execution of the deed of trust was duly proven by one of the attesting witnesses thereto, and on the same day the instrument was filed for record in the office of the probate judge. It was not, however, actually recorded until the 12th of the ensuing August. In the period that intervened between the filing for record of the deed of trust and its actual registration, the said Prior, being indebted to W. S. Cothran, Son & Co., a banking house in

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Rome, Georgia, in the sum of \$8,200, executed on 12th May, 1869, a deed of trust on all the lands in question, to secure his said indebtedness—the conveyance being made to H. D. Cothran, as trustee, and recorded on the day of its execution. The bill avers that the said W. S. Cothran, Son & Co. had no notice of the prior encumbrance of said E. J. Swain, as trustee, for his wife, although the records of said county had been carefully examined in the early part of the month of May, 1869. The bill further avers the transfer to the complainant, Robert T. Fouche, for a stated consideration, of the deed of trust executed by Prior to W. S. Cothran, Son & Co., as aforesaid; and the complainant files the present bill as the successor to all the interest of said Cothran, Son & Co. in the lands embraced in said deed of trust.

The bill specifically describes divers conveyances of different parcels of the lands in question, supposed to constitute clouds upon claimant's asserted title thereto. Among these are, the deed of trust, dated January 14, 1869, given by Prior to Ebenezer J. Swain, to secure to Mrs. Swain the unpaid balance of the purchase-money for said lands; and the deed from Prior to Mrs. Swain, dated October 7th, 1872. This latter deed resulted from the compromise of the foreclosure proceedings instituted by Mrs. Swain, and is sufficiently noticed in the opinion. The bill prays that said lands be sold to satisfy the unpaid balance of the indebtedness secured by complainant's deed of trust; that the right of John T. Prior to redeem the lands be foreclosed; and, "to the end that said lands may sell for their full and true value" that the various conveyances above noted (and others) be declared to be "void and of no effect" as against complainant's said deed of trust.

The action of the court in sustaining demurrers to the bill, interposed by Swain and wife, is here assigned as error.

PARSONS & PARSONS, for appellant.

HEFLIN, BOWDEN & KNOX, *contra*.

SOMERVILLE, J.—The interest which the complainant claims to the lands in controversy is derived through a junior mortgage executed on May 12, 1869, by one Prior to one Cothran, as trustee, of the debt secured by which the complainant is the transferee.

In whatever aspect we regard the bill—whether as one brought by a junior mortgagee to redeem, or to sweep away other incumbrances claimed to be invalid, and to foreclose the complainant's mortgage—it is equally lacking in equity.

If the purpose be redemption, this is a recognition of the

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validity of the prior mortgage, and it would be necessary to offer in the bill to pay the amount due on such superior incumbrance, and, in the absence of such an offer, the bill would be wanting in equity.—*Rison & Co. v. Holden*, 77 Ala. 515; *Cramer v. Watson*, 73 Ala. 127.

The bill, however, contains no such offer and plainly has no such purpose as redemption in view. On the contrary, it attacks the validity and priority of the title acquired by the appellee, Mrs. Swain, through a mortgage, or trust deed executed for her benefit by Prior on January 14, 1869.

Under the facts stated in the bill, the truth of which is admitted by the demurrer of appellees, the complainant's title was subordinate and inferior to that of Mrs. Swain. This is made manifest from the statement of two very plain propositions.

In the first place, the trust deed executed by Prior for Mrs. Swain's benefit was given to secure a part of the unpaid purchase money on the land in controversy, and being signed and delivered on January 14, 1869, was prior, in point of time, to complainant's mortgage by nearly four months. True it was not recorded until after the execution and registration of the trust deed under which complainant claims, but it was delivered to the probate judge, or, as commonly expressed, was filed for record, on April 26, 1869, or more than two weeks before the making and recording of complainant's mortgage. Under the statute every conveyance of this kind is "operative as a record from the day of the delivery to the judge," and such delivery, therefore, places the legal and equitable rights of the mortgagee precisely on the same basis as if his mortgage were fully and accurately recorded, without even a mistake.—Code, 1876, § 2149; *Mims v. Mims*, 35 Ala. 23.

The title of Mrs. Swain being thus superior to complainant's, we can see nothing in the facts of the case by which this priority has been lost or forfeited. It is shown that in January, 1870, a bill was filed by Mrs. Swain to foreclose her trust deed against Prior. This suit, however, was compromised, and, pursuant to the terms of settlement between the litigants, Prior and wife conveyed the mortgaged lands—or more properly speaking, their interest in them—to Mrs. Swain by deed bearing date October 7, 1872. It may be conceded this deed did not affect the rights of complainant, as acquired by the transfer to him of the Cothran trust deed, because Prior could convey no better title than what he owned. No more did it affect the prior mortgage and superior title of Mrs. Swain. It may have satisfied it as between her and Prior, just as the successful prosecution of the foreclosure suit would have done. But as to any junior incumbrancer, her superior equity would

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still be preserved in its full force and vitality. There would be but a poor show of logic in holding that this strengthening of her title by Mrs Swain, has, after all, but served to weaken it. It is common practice for courts of chancery to keep alive equitable liens and incumbrances as against strangers or third parties. Equity could often be but badly administered without it.

There are other grounds, perhaps, upon which the correctness of the chancellor's rulings could be sustained, but we desist from considering them. The demurrer to the bill was properly sustained, and the decree is affirmed.

Allen v. Allen.

Motion to Set Aside Sale of Lands under Execution during Pendency of Appeal in Supreme Court.

1. *Chancellor may entertain motion to set aside sale of lands, under execution issued on decree, while appeal pending in this court.*—Pending an appeal in this court, from a decree rendered in a chancery case, the chancellor has no power or jurisdiction to render any further decree affecting the rights and equities of the parties; but, having the power, common to courts of law and equity, to prevent the abuse of its process, he may entertain a motion to set aside a sale of land under execution issued on the decree.

2. *Same.*—An appeal lies from a decree dismissing such motion.

3. *System of executing decrees of Chancery Court assimilated to that of Circuit Court.*—By statutory provision (Code, § 3906), the whole system of executing the decrees of the Chancery Court is assimilated, as far as practicable, to that prevailing in the Circuit Court, and like writs of execution are allowed in each court in like cases.

4. *Execution against executor or administrator in representative character; when may issue against him individually.*—After the issue of an execution against an executor or administrator in his representative character, and its return "no property found" on a decree in the Chancery Court, as on a judgment at law, an execution may be issued against him individually; nor is it necessary that another execution, to be levied *de bonis testatoris* should be sent to the county in which he was appointed.

5. *Demurrable defects in petition not available to appellant unless specified in demurrer.*—In a petition asking to set aside a sale of lands under execution, an averment that the land "was sold for a grossly inadequate price," if objectionable as the averment of a legal conclusion, is amendable; and the defect not being specified in the demurrer, nor called to the attention of the chancellor, is not available in this court.

APPEAL from Jefferson Chancery Court.

Heard before the Hon. THOS. COBBS.

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This appeal is prosecuted by Josiah Allen, executor of Robert Allen, deceased, from the refusal of the chancellor to entertain a motion made by appellant to set aside and annul the sale of certain real estate, under execution against appellant personally, a previous execution against him in his representative capacity having been returned unsatisfied. The final decree against the said Josiah Allen, executor, was rendered on the 16th day of July, 1884, and execution issued on the 1st of the following September, being returned by the sheriff "no property found." Thereupon, on 21st October, 1884, an execution was issued against the appellant "in his individual character" and levied on real estate belonging to him situated in the city of Birmingham, and the property was duly sold on the first Monday in December, 1884. This sale the appellant moved to set aside on the grounds, *inter alia*, that the lands were sold for a "greatly inadequate price." "That there was no authority under the law to issue the execution in said cause against the defendant personally, and the execution and sale thereunder, are null and void;" and that at the time of the issuance of said execution, the defendant held unadministered property, assets of his decedent's estate, in the county of Russell, Alabama, and no execution against the defendant in his capacity as executor, was ever issued to said county of Russell, although the complainant well knew that said property was situated in said county and held by the defendant as executor. To this motion the chancellor sustained a demurrer upon the ground that the appeal taken to this court (*Allen v. Allen*, present term), divested him of all jurisdiction in the premises, and the decree sustaining the demurrer and dismissing appellant's motion, is here assigned as error.

HEWITT, WALKER & PORTER, and SAMUEL F. RICE, for appellants.

JAMES J. GARRETT, *contra*.

SOMERVILLE, J.—The chancellor very clearly erred in dismissing the motion made by the appellant to set aside the sale of the lands in controversy, upon the theory that the appeal pending in this court deprived him of all jurisdiction of the matter. We do not doubt that, when a decree has been rendered by a court of equity, and an appeal has been prosecuted to this court from such decree, a chancellor would no longer have such jurisdiction of the cause as would enable him to render any further decree affecting the rights and equities of the parties in the same cause during the pendency of the appeal.

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The present motion, however, is a separate and distinct proceeding from the chancery suit which culminated in the decree from which the appeal in question was taken. It is based upon grounds which have nothing to do with the equities involved in and settled by that decree, and which have even originated subsequent to its rendition. The purpose of the motion is not to raise any question going behind the decree or concluded by it, but only to prevent any abuse of the process of the court by the agency of which it is sought to enforce the execution of the decree. It is manifest that whatever course may be taken by the appellate court as to the decree appealed from, whether it be affirmed or refused, the questions arising from this motion would neither be discussed nor determined. Courts of law and equity alike exercise the jurisdiction of setting aside sales where there has been an abuse of their process, and for the advancement of the ends of justice. *Holly v. Bass*, 68 Ala. 206. The universal practice is to allow a separate appeal for judgments involving the determination of motions of this nature on the theory that they are original suits separate and distinct from the principal suit or action to which they are merely collateral.

It is contended that the register had no authority, under the statute, to issue execution against the property of the defendant as an individual, but only as executor, because he was sued in the latter and not in the former capacity. Section 3908 of the present Code (1876) is relied on in support of this view, and would sustain it if the section stood alone, and unmodified by other statutory provisions. But section 3906 provides that all writs for the collection of money, which are in use in the common law courts, "are to be adapted to the execution of decrees in the courts of chancery." The purpose of this truism, in our opinion, was to assimilate the whole system of executing the judgments of the Chancery Courts to that prevailing in our Circuit Courts, as far as practicable, and to allow in each court like writs of execution in like cases. This would authorize the issue of execution against an executor or administrator personally, to be levied of his individual property, after the previous issue of execution against him in his representative character, with the return of "no property" by the sheriff or other officer of the county in which the judgment was rendered.—Code, § 2620.

It is obvious that the issue of an execution against the appellant personally was authorized by a return of "no property" by the sheriff of Jefferson county, where the judgment was rendered on which the execution issued, and that it was not necessary to have first sent an execution to Russell county to be levied *de bonis testatoris*, as is contended.

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It may be that the averment made in the petition, that the real estate in controversy "was sold for a grossly inadequate price," was rather the averment of a legal conclusion than a mere matter of fact, yet there was no objection by demurrer, or otherwise, to this alleged defect or insufficiency of pleading, which was susceptible of being remedied by amendment, had attention been called to it in the court below. The chancellor made no decision on this feature of the complaint, and properly so, because he could allow no objection of this nature which was not distinctly stated in the demurrer.—Code, 1876, § 3005. For these reasons we decline to consider any question now raised for the first time in this court, based on this alleged defect in pleading.—*Humphreys v. Burleson*, 72 Ala. 1; *P. & M. Mut. Ins. Co. v. Selma Savings Bank*, 63 Ala. 585.

Reversed and remanded.

Raney v. Raney.

Detinue.

1. *Error without injury.*—Under a plea in abatement, averring residence and freehold in another county at the commencement of the suit, two issues being presented—namely, in what county the defendant resided, and whether he had estopped himself from setting up such residence by reason of admissions made to the plaintiff and his attorney; in such case, when the verdict of the jury affirmatively ascertains the fact of the defendant's residence in the county in which the suit was brought, then, though there may have been error in the charge of the court on the issue of estoppel, it is error without injury, and constitutes no cause for reversal.

APPEAL from Macon Circuit Court.

Tried before Hon. J. E. COBB.

This was an action by Irving Raney against W. N. Raney for the recovery, *in specie*, of designated articles of agricultural produce; and was commenced on 29th April, 1885. Issue was joined on a plea in abatement, filed by the defendant, averring, as shown by the bill of exceptions, "that he was not, at the commencement of this suit, a resident of said Macon county, but was before, and at that time, and still continued to be, a resident citizen of the State of Alabama, and a resident freeholder and householder of the county of Jefferson in said State, and never had been a resident of said Macon county." On the trial of this issue "it was conceded," as recited in the bill of exceptions, "that the defendant had been a householder

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of said Jefferson county, and a resident citizen of the State of Alabama for a considerable time; and up to a period not many weeks prior to the commencement of this suit. The evidence was conflicting as to whether or not he had actually removed his residence to said Macon county." Evidence was adduced tending to show that the defendant had admitted to the attorney of plaintiff "that he, the defendant, had come to, and was in Macon county to stay—and intended to stay." There was, also, evidence of similar declarations made to the plaintiff himself. Touching these declarations, the court charged the jury, in effect, "that if the defendant made them in response to inquiries which he knew were preliminary to the institution of suit, and knew that it was the intention and purpose of plaintiff to bring such suit;" and if the plaintiff, "relying on said declarations of defendant, brought this suit in this county," then the defendant could not be permitted to plead his residence in another county, but was estopped to set up such residence as a defense to this suit. To this charge the defendant excepted, and the same is here assigned as error.

W. F. FOSTER, for appellant.

ABERCROMBIE & BILBRO, *contra*.

CLOPTON, J.—The defendant pleaded, in abatement, that he was a householder of this State, and had, at the time of the commencement of the suit, a permanent residence in a county other than that in which the suit was brought. On this plea, two issues were presented: 1st. The county of the permanent residence; 2d. If his residence was in another county, whether he was estopped to set up such residence by his declarations to the plaintiff and his authorized attorney. The instruction of the court on the question of estoppel is the only error assigned.

The jury, by their verdict, found "the issue against the plea in abatement, and that the defendant was, at the commencement of this suit, a resident citizen of Macon county." The evidence was conflicting in respect to the removal of the defendant's residence prior to the institution of the action. Had the verdict been *general* in favor of the plaintiff on the plea in abatement, we would have presumed, that the charge of the court, if erroneous, operated to the injury of defendant, as it would not affirmatively appear that the verdict was founded otherwise than on the issue of estoppels. But the jury find specially, that the residence of defendant was in the county in which the suit is brought, at the time of its commencement. The case having been determined on the one issue—the actual

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residence of the defendant—which fact affirmatively appears from the record, it results that, though there may have been error in the instruction of the court on the issue of estoppel, it is error without injury, and constitutes no cause for reversal. *Foster v. Johnson*, 70 Ala. 249; *State v. Brantley*, 27 Ala. 44.

Affirmed.

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Action for Breach of Agreement to pay Stock Subscription.

1. *Court of equity will enforce assessments when directors fail to perform that duty.*—If the directors of a private corporation, having authority to call in unpaid subscriptions of stock, fail to make the assessments and collections necessary to meet the demands of creditors, a court of equity will take jurisdiction, at the instance of creditors, and enforce the necessary assessments.

2. *When statute of limitation begins to run in favor of stockholders.* When the terms of subscription bind the stockholders to pay the amount subscribed by them respectively, “in such installments as may be called for by said company, and one *per cent.* at the time of subscription;” and the corporation, becoming embarrassed, executes a deed of assignment for the benefit of creditors, not having called in all the stock subscribed; the statute of limitations in favor of the stockholders, as to their unpaid subscriptions, does not begin to run from the date of the assignment, but from the time when, under a bill filed by creditors, a decree is afterwards rendered by a court of equity making an assessment and call for the unpaid subscriptions.

APPEAL from the Circuit Court of Montgomery.

Tried before Hon. JAMES E. COBB.

The opinion states the facts.

W. M. S. THORINGTON, for appellant.

No counsel of record for appellee.

SOMERVILLE, J.—The present action is brought for a certain portion of the unpaid subscription to the capital stock of the National Express Company, a body corporate organized under the laws of the State of Virginia. The action is instituted by the plaintiff, as trustee, duly appointed by a court of competent jurisdiction, and fully authorized to sue. No question arises as to the personal disability of the plaintiff to maintain the action, nor is the jurisdiction of this court, which clothed him with his authority to sue, in any wise challenged.

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The only point raised by the record is, whether the action is barred by the statute of limitations of six years, which is the period fixed in this State for commencing actions founded on promises not under seal.

The subscription in question was made by the defendant in the year 1866, by which he agreed to pay to the National Express Company the sum of one thousand dollars "in such installments as *may be called for* by said company, and to pay one *per cent.* at the time of subscription." The company was organized, and carried on business for many months, but becoming financially embarrassed, executed a deed of assignment, in September, 1866, conveying to certain trustees all of its property, including unpaid subscriptions to its capital stock, for the purpose of securing its creditors. In December, 1871, a creditor's bill was filed in the chancery court of Richmond, the proceedings of which show proper jurisdiction of the subject matter and of the parties, praying for the removal of the trustees appointed in the deed of trust, and the substitution of others in their stead; that the liabilities of the company be ascertained, and an assessment be made by authority of the court upon the unpaid capital stock for the purpose of discharging these liabilities. The court assumed jurisdiction of the cause and granted the prayer for relief, the plaintiff, as we have said, being substituted as trustee, and authorized to execute the trust. It being ascertained, further, that there remained uncalled for and unpaid the sum of eighty dollars or eighty *per cent.* on each share, it was ordered and decreed by the court, on December fourteenth, 1880, that thirty *per cent.* of the par value of each share of said stock be assessed and called for, this sum being required to pay the debts of the company.

Under this state of facts, the court below gave the general charge for the defendant, evidently adopting the view contended for by appellee's counsel, that the statute of limitations commenced to run in favor of the stockholders from the date of the execution of the deed of assignment by the company, in the year 1866.

It is insisted, on the contrary, by the appellant's counsel that the statute did not commence to run, by the terms of the subscription, until the assessment and call were made under authority of the Chancery Court; and that the charge of the Circuit Court was, for this reason, erroneous.

We are unable to resist the conviction that the latter view is the correct one, as better supported both by the test of reason and the weight of authority.

It may be regarded as axiomatic that it was the duty of the directors of this corporation, as faithful fiduciary agents, to administer with fidelity the trust which they had assumed.

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Among the plain duties imposed upon them by law was, to see that the property of the company was honestly appropriated to the payment of its just debts. The unpaid subscription to stock was a trust fund in their hands pledged for this purpose. They had the lawful authority to make a call for so great a per centage of these subscriptions as was needed to discharge these corporate liabilities, and their duty was commensurate with their power. This duty, it is made to appear, they neglected to perform. And in view of such negligence and wilful inaction on their part, it devolved upon a court of equity, on proper application, to afford the requisite relief. It is a part of the inherent and original jurisdiction of such courts to compel the execution of trusts, and no plainer or more conspicuous illustration of this principle can be found than the frequent cases in modern times, where they have, by a strong arm, coerced the proper application of the assets of insolvent corporations to the satisfaction of their debts. It is now, accordingly, well settled that courts of equity may enforce the payment of stock subscriptions, where the directors have neglected or refused to make assessments and calls for them in the exercise of their proper fiduciary duty.—*Glenn, Trustee, v. Williams*, 60 Md. 93; *Sawyer v. Upton*, 91 U. S. 56; *Hall v. U. Ins. Co.*, 5 Gill 484; *Hatch v. Dana*, 101 U. S. 205; *Adler v. Milwaukee Bank Co.*, 13 Wis. 61; *Ward v. The Griswoldville Manfg. Co.*, 16 Conn. 593; *The Dalton etc. R. R. Co. v. McDaniel*, 56 Ga. 191.

But we do not understand the existence of this power in a court of equity to be seriously controverted. The point of contestation relates rather to the legal effect of its actual exercise, after it has been put in operation by a court of competent jurisdiction.

The question as to when the statute of limitations commenced to run depends, in this case, upon a proper construction of the contract of subscription. The promise of the defendant was to pay in such installments as may be called for by the board of directors of the company—which means in such sums and at such times as they might thereafter declare to be necessary. After the first assessment had been made and called in, it could not be known that any further call would ever be made. If the business of the company prospered, no further payments might probably be needed. But if bad management characterized its operations, or disaster beset it for any reason, such a call would be imperatively required. The defendant's contract, therefore, was not to pay absolutely or at all events, but upon a contingency—this contingency to be determined by the directors of the company, who were the mere agents of the stockholders, or, in the event of

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their neglect or refusal to act, by the decree of a court of chancery.

The settled rule is, that where money is to be paid, or a thing is to be done, upon the happening of a contingency, or uncertain event, no cause of action accrues, and, therefore, no limitation can run until the contingency happens, or the event takes place. The clear reason is, that until then there is no breach of the contract, the obligation of the promise being in the meanwhile suspended.—1 Addison on Contr. §§ 406, 407; Angell on Lim., §§ 113–115; 2 Parsons on Notes & Bills, 639–644.

This rule has been frequently applied by the courts to actions for unpaid subscriptions for stock like the one in hand. In *Glenn, Trustee, v. Williams*, 60 Md. 98, where precisely the same point now before us was under consideration, in a similar action brought by the same plaintiff, it was held by the Court of Appeals of Maryland that the statute of limitations began to run only from the time of the assessment made by the decree of the court in Virginia. It was observed that, after the payment of the first assessment, there was nothing due from the subscribers “until an authorized call was made for the residue.” “The contract,” said Alvey, J., in his most learned and able opinion, “contemplated the exercise of judgment and discretion on the part of the president and directors as to the times and amounts of future payments on the stock, and there was nothing due from the stockholders until such amounts were determined on, and regularly called for. Until a regular call made, there was no unconditional liability on the part of the stockholder to pay. Until then he could not know when to pay, or how much he would be required to pay. The subscription, therefore, was conditional as to the times and amounts of payments; and, consequently, there was no fixed obligation of the stockholder to pay, and no right of action against him, until an assessment and call made, either by the president and directors, or by the order of a court of competent jurisdiction.”

In *Scovill v. Thayer*, 105 U. S. 148, we have a strong authority holding the same view. After announcing the doctrine, that, where the company neglects or refuses to make the call, a court of equity will do so, if the interests of the creditors require, the court said: “But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call of the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment. And it is clear,” concludes the court, “the statute of limitations does not begin to run in his favor until such order or demand.”

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In *Savage v. Medbury*, 19 N. Y. 82, the suit was by the receiver of an insolvent insurance company upon a premium note, payable in such portions and at such times as the directors might require. It was held that no action could be maintained on the note without a previous assessment, agreeable to the terms of the subscription. And this ruling is followed by subsequent cases in that State.—*Howlands v. Edmunds*, 24 N. Y. 307; *Howland v. Cravendall*, 40 N. Y. 320.

In *Gibson v. Columbia, &c. Bridge Co.*, 18 Ohio St. 396, the suit was on an unpaid subscription to corporate stock made about sixteen years previously. It was held that the cause of action did not accrue, nor, consequently, the statute of limitation commence to run, until a call was made by the company. To the same effect is *Kilbrath v. Gaylord*, 34 Ohio St. 305.

There are a large number of adjudged cases in other States supporting the same principle, to which we refer, merely, without comment.—*Sinkler v. The Turnpike Co.*, 3 Penn. Rep. 149; *Bigelow v. Libby*, 117 Mass. 359; *Macon & Augusta R. R. Co. v. Vason*, 52 Ga. 326; *Hope Mut. Ins. Co. v. Weed*, 28 Conn. 51; *Warner v. Boom*, 86 Iowa, 386; *Western R. R. Co. v. Avery*, 64 N. C. 491.

In *Curry v. Woodward*, 53 Ala. 370, where the effort was to subject an unpaid subscription of stock to the process of garnishment at the instance of a judgment creditor of an insolvent insurance company, the subscription was payable at such times and in such amounts as should be called for by the board of directors. Upon a plea by the defendant that the debt was barred by the statute of limitations, it was said that the statute would not begin to run "until the call was made, or, there was an evident disbandment of the company and relinquishment of the business." The next cursory reading of the case shows that this observation was a *dictum* so far as the latter proposition embodied in it is concerned. It was not a point involved in the case, nor was it necessary to be decided. In the present case, however, it is not made to appear that there has been any disbandment of the company in the sense of affecting its corporate integrity or effecting its dissolution. The statutes of the State authorizing its existence seem to preserve its organization until the full liquidation of its liabilities. We can not see that the cessation of business by the company, and the assignment of its assets, can operate, on any just principle, to set in motion the running of the statute of limitations in favor of stockholders. It is true that this state of facts may prove the necessity for calling in unpaid subscriptions for stock in order to liquidate any outstanding corporate liabilities, but in no sense is it tantamount to an actual assessment and call either by the directors or by a court of competent jurisdiction.

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The failure of the directors to make such assessment and call is, as we have said, a failure to discharge their duty. They are the agents and representatives of the stockholders, and their dereliction of duty may be justly visited upon their principals. As against the creditors of the company, who have created their debts upon the faith of these subscriptions for stock, the stockholders ought not to be permitted, in our judgment, to take advantage of this wrongful act—this misfeasance of their own constituted agents. The law allows no man to reap a reward from his own wrong any more than it permits him to stipulate for iniquity. The one is as unconscionable as the other. The practical operation of such a principle would be fraught with great evils by affording a patent for the easy extinguishment of corporate debts. All that need be requisite would be the making of a general assignment, and the postponement of suits against stockholders by protracted litigation in chancery for a period of six years. The present case, with its history of expensive litigation in all its varied and numerous forms, extending through so many years, is itself an unanswerable refutation of the proposition contended for by the learned counsel for the appellee.

It is our opinion, that in this case, the statute of limitations did not commence to run in favor of the defendant until the decree of the Chancery Court of the city of Richmond, ordering the assessment and call for thirty *per cent.* of the unpaid subscription for stock, which was on the fourteenth day of December, in the year 1880. This date being less than six years before the bringing of the action, no bar had accrued, and the charge of the court was consequently erroneous.

It may be proper to add in conclusion, that there is a class of cases not to be confounded with the present one, although somewhat analogous to it. Of this class *Hatch v. Dana*, 101 U. S. 205, is an example. There a creditors' bill was filed by a judgment creditor of a corporation seeking to coerce payment out of the unpaid stock subscriptions. It was held that the bill could be maintained although there had been no calls for them by the company, the court treating the debts as due without further demand. But it was observed that this was true only "as between the debtor and the creditor of the corporation," the court of equity in such cases, pursuing its own mode of collection within the limits of doing justice to the debtor. It needs no argument to show that the two classes of cases are easily distinguishable on sound principles.

The judgment is reversed and the cause remanded.

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Kennedy et als., Ex'rs, v. Winn et al.*Bill in Equity against Personal Representatives of Deceased Trustee for Settlement of Trust.*

1. *Acceptance of trust is ordinarily presumed ; when may be inferred.* Acceptance of a trust, created by will, deed, or other instrument, is ordinarily presumed, and is not required to be in writing, nor manifested by express words, but may be inferred from interference with the trust property, or acts done in performance of the duties of the trust.

2. *Voluntary interference with trust property ; when regarded as acceptance of trust.*—Any voluntary interference with the trust property will be held an acceptance, unless it can be plainly referred to some other ground of action ; the *onus* being on the trustee to show this, and every doubt being resolved against him.

3. *Giving of receipt by trustee describing himself as such ; when indicating acceptance of trust—(this case.)*—Where a sum of money was bequeathed in trust, to be loaned out on bills of exchange or bonds secured by mortgage, the interest to be collected semi-annually by the trustee, and paid over to the beneficiaries ; and the administrator of the estate made an arrangement with a mercantile house, of which the trustee was a partner, to supply the beneficiaries with goods on credit, to be paid out of the semi-annual interest as it accrued, and paid the accounts every six months, taking receipts signed by the trustee as such ; *held*, that the giving of these receipts showed an acceptance of the trust, notwithstanding the accompanying declarations of the trustee that “ he would not accept the general trust,” and the fact that the administrator represented that he only wanted a proper receipt to use as a voucher on his settlement.

4. *Refusal of trustee to allow process for collection of decree rendered in his favor to be issued ; liability of trustee for loss caused by such action (this case.)*—On final settlement of the administrator's accounts, a decree was rendered against him, in favor of the trustee, for the amount of the trust, whereupon the trustee disavowed the authority to use his name, filed a protest in the Probate Court, and would not allow any process for the collection of the decree to be issued in his name ; *held*, on these facts, the money being lost by the failure to collect the decree, that the trustee was liable for the loss.

5. *Statute of limitations has no application, in cases of express trusts, between trustee and beneficiaries.*—In cases of express trusts, the statute of limitations has no application as between the trustee and beneficiaries, and no length of time, short of the period of prescription, is a bar ; though there are exceptions to this rule, where there has been a settlement, or other final termination of the trust, or an open disavowal and repudiation brought home to the knowledge of the beneficiaries.

6. *Acceptance of trust ; when vacancy not created by subsequent disclaimer.*—In this case, the trustee having accepted the trust, his subsequent disclaimer did not create a vacancy in the office, nor authorize the appointment of another trustee ; and no loss occurred for two years afterwards. The trustee lived five years after the loss occurred ; and the bill was filed, asking the appointment of another trustee, and the

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recovery of the trust fund, within two years after his death. *Held*, that though the complainants, who had only a life interest, might be barred by *laches* as to the accrued interest, their claim to the interest accruing in future was not barred, and the rights of the remainder-men were not affected by the delay.

APPEAL from Tuskaloosa Chancery Court.

Heard before Hon. THOMAS COBBS.

The bill in this case was filed on 22d November, 1882, by Sarah Francis Winn and Martha Stella Woods, daughter and grand-daughter, respectively, of Lucinda Perteet, deceased, against Edward N. C. Snow, William A. Leland and John R. Kennedy, executors of the last will and testament of Richard C. McLester, deceased. The purpose of the bill, and the facts disclosed by the record are sufficiently stated in the opinion.

VANHOOSE & POWELL, and WOOD & WOOD, for Appellants.

J. M. MARTIN, and McEACHIN & McEACHIN, *contra*.

CLOPTON, J.—A person, nominated trustee by deed, will, or other instrument, may, at his election, accept or disclaim. Though acceptance is necessary to constitute a trustee; when the trust is not raised by implication or construction of law, or is not coerced for the purpose of complete justice, as the result of the party's own conduct or acts, its acceptance is not compulsory. No one, without his assent, will be constrained to undertake the duties, and incur the responsibility of a trust. Acceptance in writing, or by express words, is not essential. Ordinarily, it is presumed. There may be such interference, or acts done in the execution of the duties, as amount to constructive acceptance. Neither, when the trust property is a chattel interest, is it requisite that the disclaimer, to be effectual, should be in any formal mode. Absolute refusal to act, or parol disavowals, may be sufficient evidence. Each case must depend on the special facts, construed under the application of a few general rules. The complainants, not claiming an express acceptance, insist that the nominated trustee performed acts, which were in execution of the trust, and which bind him to an acceptance. And the defendants contend, that his parol declarations, contemporaneous with the performance of the acts, are tantamount to a disclaimer.

The following facts may be regarded as established by the evidence: Lucinda Perteet, by her will, bequeathed to Richard McLester, the testator of the defendants, in trust for the complainants, a sum of money consisting of gold and United States treasury-notes. The money was to be loaned on bills of

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exchange, or bonds, secured by a mortgage on real estate, with the interest payable semi-annually, if practicable. As the interest was collected, the trustee was to pay it to complainants, during their respective lives, in the proportions provided by the will. The other provisions of the bequest are not material, as respects the questions involved in this aspect of the case. The will was admitted to probate in November, 1870, and John S. Kennedy was appointed administrator of the estate. Kennedy, with the consent of complainants, arranged with R. & J. McLester, a mercantile firm of which the nominated trustee was a member, to let the complainants have goods on a credit, and look to him for payment out of the semi-annual interest. When the first payment was made, June 30, 1871, McLester, as trustee, gave Kennedy a receipt, which specified on its face, that the sum received was six months' interest on the money willed to Sarah Winn by her mother, Lucinda Perteet, and for which he was appointed trustee. Each six months thereafter, to January, 1874, receipts were given to Kennedy for the interest, signed by McLester as trustee for complainants. When the first receipt was called for, McLester declined to sign it as trustee, saying that he had only agreed to let complainants have goods, and that payment therefor was to be made with the interest, and that he did not intend to accept the trust; but signed the receipt, on being assured by Kennedy, that what he wanted was a proper voucher on his settlement as administrator; that signing it as trustee would not bind him as such, without a formal acceptance; and that "he would not accept the general trust." In the first receipt, the word, *trustee*, is in McLester's handwriting. The subsequent receipts were prepared, with the descriptive words written thereon, before carried to him to sign; and the evidence tends to show, that at the time of signing each succeeding receipt, he made the same declaration of an intention not to accept the trust. In August, 1874, Kennedy made a final settlement of his administration, on which a decree was made in favor of McLester, as trustee, for the trust money in the hands of the administrator. On being informed that such decree had been rendered, he disavowed the authority to use his name, and in August, 1876, filed in the Probate Court a protest, and refused to permit any process, for the collection of money, to be issued on the decree in his name. When Kennedy, after the final settlement, offered him the notes of Baugh, Kennedy & Co., to whom money of the estate had been loaned, he refused to receive them, and refused to accept the trust. This was the first time, as the witness states, he had made formal and positive refusal to accept the trust. The question arising on these facts is, whether, under the circumstances, signing the receipts,

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and receiving the interest, bound him to an acceptance, notwithstanding the cotemporaneous parol declaration, that he did not intend to accept?

In 1 Perry on Trusts, § 261, it is said: "The general rule is, that *every voluntary* interference with the trust property will stamp a person as an acting trustee, unless such *interference* can be *plainly* referred to some other ground of action than the acceptance of the trust." Any voluntary interference is, *prima facie*, an acceptance; and such interference having been shown, the *onus* is on the person appointed trustee to show, that it is clearly referable to some other ground of action. It is not a question, whether it is referable to an acceptance of the trust. It is presumptively so, unless shown to be otherwise. There must be no ambiguity in this respect. If it is a matter of doubt, whether the intention was to accept the trust, or to act in some other capacity, the doubt will be resolved against the trustee, and he will be held to have accepted the trust, and all its responsibilities. The policy of the law will not permit a person to place himself in a condition, in which he can say he is or is not trustee, as may subserve his personal interest.

It may be said, generally, that any acts, relating to the control, management, or disposition of the subject-matter of the trust, assertion of ownership, or execution of the duties of the trust, by a person, nominated trustee, with notice thereof, will be regarded an acceptance. "Any act by which the trustee manifests an intent to acquire or exercise any influence in the management of the trust property, will tend to fix upon him the responsibility of the trust." In *Conyngham v. Conyngham*, 1 Ves. 522, the appointed trustee was held to account, because of receiving the rents and profits, though he claimed to have acted only as friend and agent. Lord HARDWICKE says: "It was incumbent upon him, if he would not have acted as trustee, to have refused, and not, going on in this ambiguous way, to leave himself at liberty to say he acts as trustee or not. Instead of this, he goes on receiving the produce; on this foundation he is directed to account." The execution of a deed, which contained no recital of a disclaimer, has been held of itself sufficient evidence, that the person who executed it, had accepted and acted in the trusts of the will, though the deed contained a recital, that it became unnecessary for them to act, and they never intermeddled in the trust; and made the deed, by request, to convey the legal estate vested in them by the will.—*Wich v. Walker*, 14 Eng. Ch. R. 702. If, however, the appointed trustee executed no other act, than a release of the legal estate, such deed of release containing a disclaimer, and the meaning and intent being to disclaim, no

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inference of an acceptance of the trust will arise.—*Nicloson v. Wordsworth*, 2 Swan. 315.

Had nothing more been done, than merely to carry out the arrangement or agreement, under which R. & J. McLester let the complainants have goods, it would have been manifest, that such acts were done in the capacity of merchant and creditor, and could have been plainly referred to this ground of action. The case would then have fallen within the rule in *Stacey v. Elph*, 1 M. & K. 195; and the parol disavowal would have been evidence of non-acceptance of the trust. But the avowed purpose of Kennedy was to obtain a voucher, showing he had paid the money to the person, authorized by the will to receive the interest. Hence, he did not take the firm's receipt as in payment for the goods, but required McLester's individual receipt as trustee, leaving him to make the appropriation of the payment. If McLester did not intend to accept the trust, it was incumbent upon him to refuse to give such receipt. Instead of doing so, he executed a receipt as trustee, showing on its face, that it was given for the interest on the money bequeathed to him in trust for complainants, and that with a knowledge of his appointment, he proceeded in the execution of the duties of the trust. In receiving the interest, and in executing the receipt, he acted in the capacity of trustee, and in no other capacity. The receipt is an unequivocal admission, that he acted in the character, and by virtue of the power in the will. It can not be referred to any other ground of action.—*Doyle v. Blake*, 2 Ch. & Le. 229; *White v. Barton*, 18 Beav. 192; *Chaplin v. Givens*, Rice 132.

The next question is, whether receiving the interest semi-annually, for more than two years, and executing the several receipts as trustee, constitute such interference as will make him responsible for the loss sustained by his failure to collect the trust money, notwithstanding his parol declarations of an intention not to accept the trust, and the assurance on which the receipts were given? On the evidence, there can be no doubt, that the money was lost by his failure to collect it, and by his interference in preventing its collection. While we have no doubt that the assurances were made honestly and in good faith, the mistaken opinion of Kennedy, as to the legal effect, will not shield the trustee from the natural and necessary consequences of his unambiguous acts. It is evident, that McLester had an apprehension, that giving such receipt would bind him to an acceptance of the trust. The essence of the assurance was, in the language of the witness, "that he would not accept the general trust;" which we understand to mean the trust as to the *corpus* of the estate. On this assurance, either for the purpose of furnishing the administrator

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with a proper voucher, or of receiving payment for the goods, or both, McLester modified his intention, and was willing to give the receipt; which, it is reasonable to infer, he supposed would not be an acceptance beyond the interest actually paid. If this be so, the error consisted in the opinion, that he could accept the trust partially, and renounce a part. His conduct in giving the several successive receipts, and his declarations, may be made consistent, by referring the declarations to an intention not to accept the trust as to the principal of the money. This construction fairly explains his conduct, and accords with the evidence, that he never positively and formally refused until the notes of Baugh, Kennedy & Co. were offered to him.

However this may be, the amenability of the trustee must be decided against the defendants on other principles. While we do not concur in the proposition, that the receipts are contracts in writing, not subject to be varied, explained, or contradicted by parol evidence; they are voluntary and deliberate admissions, with notice of the facts, of the trust nature of the funds, his appointment as trustee, and the reception of the money in his fiduciary character under the power conferred by the will. It is not claimed that there are in the receipts any misdescriptions, or inaccurate references to the money received; or that they were given in mistake of fact, or by surprise; or that they were obtained fraudulently, or by a concealment or misrepresentation of material facts. The effort is not to explain or contradict, but to show by parol evidence an intention different from the legal effect of the receipts. An oral declaration of an intention not to accept a trust, made contemporaneously, would not defeat an express acceptance in writing, unless shown to have been procured by fraud or surprise. The first receipt is, in legal effect and for legal purposes, the equivalent of an express acceptance, and an adverse parol declaration will not obviate the force and operation of the one, any more than of the other. It would be a dangerous precedent to permit an acceptance of a trust, resulting from the acts of the trustee, evidenced by writings signed by him, to be overridden by a disclaimer resting only in parol. The receipts were given with the knowledge, that they were to be used on the settlement of the administrator's accounts for the purpose of influencing the action of the court of probate, and to enable the administrator to obtain an allowance of the amounts of the receipts, as properly disbursed. They were to be preserved among the papers of the administration, in a public office, to which the complainants had the right of access. Had the interest been misapplied, and the trustee called to account, in a proper case, he would be estopped from denying, that he received the money in the capacity of trustee. Having

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acted in his character of trustee, and having suffered himself to be represented in that character before the court having jurisdiction of the estate, and in judicial proceedings, he brought upon himself all the burdens and responsibilities of the trust, and is precluded to deny its acceptance. The court was justified, under such circumstances, in rendering a decree in his favor as trustee.—*Maccubbin v. Cromwell*, 7 G. & J. 157. Having once accepted the office, he could not, afterwards, by disclaimer or renunciation, avoid its duties and responsibilities. He could have been relieved, only by a special power in the appointing instrument, or by a court of equity, or in the summary manner provided by statute.—1 Perry on Trusts, §§ 168, 401; *Drane v. Gunter*, 19 Ala. 731; *Ward v. Lewis*, 4 Pick. 518.

The defendants further insist, that the claim of complainants is barred by their *laches*. The general rule is, that in cases of express trust, peculiarly cognizable in equity, the statute of limitations, as between trustee and *cestui que trust*, has no application; and no length of time, short of the period of prescription, is a bar. The general rule has its exceptions. If there has been a settlement, or other final termination of the trust, or an open disavowal and repudiation, brought to the knowledge, actual or constructive, of the *cestui que trust*, the statute of limitations is put in operation. The question, from what time does the statute commence to run, has most generally arisen in cases where, either the trustee has repudiated the trust and asserted a hostile claim to the property, or where there has been a settlement, and he is afterwards called to account for breaches of trust committed anterior thereto. The disavowal and repudiation, to be sufficient, must terminate the trust as a subsisting trust, and be brought to the knowledge of the *cestui que trust* in such manner that it is incumbent upon him to assert his equitable rights. In case of an accepted trust, passiveness or a failure to execute the duties, will not put the statute in operation.—*McCarthy v. McCarthy*, 74 Ala. 546; *Hovenden v. Anesly*, 2 Sch. & Lef. 693; *Baker v. Whiting*, 3 Simon, 475; Perry on Trusts, §§ 863, 864.

The exception, that an open denial or repudiation brings a direct and technical trust within the operation of the statute, ordinarily applies where the subject-matter is tangible property, of which the trustee may assume absolute ownership, requiring the *cestui que trust* to act as upon an asserted adverse title. But, generally, the statute of limitations can not be pleaded against a mere breach of trust.—*Botcher v. Allington*, 3 Atk. 452. And, when the *cestui que trust's* right of action is wholly founded on a breach of trust, the subject-matter having been lost or misapplied by the negligence or wrongful act

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of the trustee, his mere denial of a previously accepted trust, or refusal to act further, unaccompanied by the assertion of an adverse title, does not bring the case within the exceptions to the general rule. Otherwise, no field remains for its operation, and it would be virtually abrogated.

A bar by the statute of limitations is not specially insisted on; but it is claimed, that the complainants have slept on their rights, and acquiesced in the conduct of the trustee for such length of time, and under such circumstances, that a court of equity, acting on its own peculiar doctrines, will not interfere to grant them relief. The bill is filed under and in pursuance of the ninth clause of the will, which provides, that in case of the decease of McLester, or his failure or refusal to undertake and discharge the trusts, another trustee shall be appointed by the chancellor of the district, on the application of complainants, or either of them; and in no event are the bequests to be paid to any person, other than the nominated trustee, or to one appointed as therein provided. The purposes of the bill are two-fold; the appointment of a trustee to execute the trust, and the recovery of the trust fund *to be turned over to him*. A vacancy in the office is preliminary to an application for the appointment of another trustee. The denial of a previously accepted trust, or the refusal to further act, does not of *itself* create such vacancy. Without the resignation or removal of the trustee, the substitution of another, during his life, is void. *Laches* can not be imputed to the complainant for a failure to apply for the appointment of another trustee during the life of McLester.

Though his declaration of a refusal to act as trustee was communicated to the complainants about December, 1874, he had not then committed a breach of the trust, on which to base a right of action. The final settlement of the administrator was made in September preceding. Having, as we hold, accepted the trust, it was his duty to have collected the money from the administrator. His conduct was passive in this respect, until August, 1876, when, by his active interference, the collection of the money was prevented. Until the bankruptcy of Baugh, Kennedy & Co. the loss or injury, occasioned by his failure to perform his duty, did not appear. These considerations, however, are only applicable to the extent of the interest which the trustee was required to pay to complainants. The case is not that of *cestuis que trust*, who have a right to recover to themselves from a trustee the damages sustained by the waste or loss of the *corpus* of the trust estate. Under no circumstances are the complainants entitled to recover and *receive* the principal; and such is not the object of the bill. Since the death of the trustee there has been no one authorized

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to collect the principal fund. Acquiescence of the complainants for any length of time, not even their sanction of the breach of trust, can bar the rights of the *cestuis que trust* in remainder, though it might operate to bar the right of complainants as to the accrued interest. The substituted trustee is not barred unless the *cestuis que trust* are themselves barred at the time of his appointment.

McLester died in January, 1881, and the bill was filed in November, 1882. If the complainants were barred as to the accrued interest, they still have an interest in the trust fund, respecting the income, that may hereafter accrue. Whether, therefore, the bill be regarded as filed by *cestuis que trust*, independently of the provisions of the will, or as filed under the authority and direction of the will, to obtain the appointment of a trustee, the court has power, and will proceed, to the end of complete justice, to recover and secure, in the same suit, the trust fund, to be turned over to the substituted trustee to execute the trust. Considered in either point of view, the bill is brought by proper parties, contains equity, and *laches*, sufficient to defeat its objects, are not imputable under the circumstances.—*Howard v. Gilbert*. 39 Ala. 726.

Affirmed.

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Brantley et al. v. Burford, Adm'x.

Bill in Equity by Beneficiaries for Account and Settlement of Trust.

1. *Bill in equity by cestuis que trust against trustee; what relief may be sought in.*—Where property is bequeathed to a trustee, to be taken care of, and the profits and interest to be paid annually to the testator's married daughter, "for the use and support of herself and her children during her natural life, and at her death the whole of said property to go and become the absolute property of her lawful heirs;" the daughter and her children may join in a bill for an account and settlement of the trust, the removal of the trustee, and the appointment of another in his stead.

2. *Same; when trustee and his sureties estopped from denying liability to account.*—When a trustee is appointed by the register in chancery, gives bond, and enters on the discharge of the duties of the trust, and a bill in equity is afterwards filed by the beneficiaries, charging waste and loss of the trust funds, asking an account and settlement, the removal of the trustee, and the appointment of another; he and his

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sureties are estopped from denying his liability to account, on account of an informality in his appointment.

3. *Statute of non-claim; when defense of may be taken by demurrer.* The defense of the statute of non-claim may be taken by demurrer, when the bill seeks to enforce a demand which is *prima facie* within the statute and does not aver presentation, nor state facts which avoid the bar.

4. *When statute of non-claim begins to run.*—Under a bond executed by a trustee appointed by the register in chancery, conditioned for the faithful performance of his duties, a liability does not accrue to the beneficiaries against the sureties until there has been a default by their principal, and the statute of non-claim (Code, § 2597) does not begin to run until such default.

APPEAL from Wilcox Chancery Court.

Heard before Hon. N. S. GRAHAM.

This was a bill in equity exhibited by Nancy A. Brantley and her children, Charles C., Adaline R., Sally and Kate Brantley, against their trustee, R. H. Dawson; John R. McDowell, the surviving surety on his bond, and Mrs. M. M. Burford, administratrix of M. M. Burford, deceased, who was McDowell's co-surety on said bond. By her last will and testament, which was duly admitted to probate in October, 1856, Sarah McMillan, the mother of oratrix Nancy H. Brantley and the grandmother of her co-complainants, devised and bequeathed her entire estate to James McMillan in trust for the benefit of said Nancy H. Brantley: the proceeds and interest of the trust estate to be paid to her annually, and on her death the *corpus* of said estate to become the absolute property of her heirs in legal shares and proportions. The testatrix nominated Lewis W. McMillan as alternate trustee in the event of James McMillan declining to assume the trust; the latter, however, duly qualified, and continued in the incumbency thereof, until his resignation in December, 1865. He was succeeded in the trust by different persons, and on 10th January, 1877, the respondent, R. H. Dawson, was appointed trustee and qualified as such a few days later, John R. McDowell and Payton D. Burford being the sureties on his bond, and received the trust fund amounting to \$4,700.59. The said Burford departed this life on 27th March, 1879, and on the 16th of the ensuing April his widow, Mrs. M. M. Burford, gave bond as administratrix of his estate. The bill was filed (presumably) in July, 1884, (the record does not indicate the exact date) and, after charging the conversion, &c., of the fund as shown in the opinion, prays for the removal of the respondent, Dawson, from the trusteeship of said fund and the appointment of a trustee in his stead; that an account be taken; and that the amount found to be due complainants be decreed to be paid them by said Dawson and his sureties.

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The appeal is prosecuted by the respondent, McDowell, from the decree of the chancellor overruling his demurrer to the bill, and by the complainants (by cross-assignment of errors) from a decree sustaining a demurrer interposed by Mrs. Burford. The grounds of the demurrers are indicated in the opinion.

S. J. CUMMING, for McDowell, and JONES & JONES for Mrs. Burford.

John Y. KILPATRICK, *contra*.

STONE, C. J.—Under the provisions of Sarah McMillan's will, the trustee was required to take care of the fund, to pay the profits and interest annually to her daughter, Nancy H. Brantley, "for the use and support of herself and her children during her natural life, and at her death the whole of said property to go to and become the absolute property of the lawful heirs of my said daughter in [equal?] shares and proportions." The present bill was filed by Mrs. Nancy H. Brantley and her children as co-complainants, and charges and alleges "that the trust fund which was received by the trustee [\$4,700] has been converted or used and consumed, or is lost and gone; and that said trustee is now totally insolvent." The bill also charges that the trustee "has never made any settlement of his trusteeship, nor has he paid the interest upon the trust fund due for 1883 and 1884, though often solicited so to do by Mrs. Nancy H. Brantley, his *cestui que trust*. She has solicited payment of the interest due for 1883, and he has not paid it." The bill does not show when the annual interest was due and payable, but we suppose at the end of the year in which it accrued. The presumption is that interest for the year 1883 is the product of the fund during that year. The language implies that. If this be the proper interpretation, the interest would not be due and demandable until the end of the year 1883. The present suit was brought in July, 1884, a little more than six months after the alleged first default in the payment of interest. The transcript before us does not show when the bill was filed, but summons for the defendants bears date July 30, 1884. The sheriff's return on the summons is not found in the record. Each defendant demurred separately to the bill, but it is not shown when the demurrers were filed. The case was set down for hearing on the demurrers at the January term, 1885, and the demurrers were ruled on at that term. There was an amendment of the bill, not deemed material, and to that amended bill separate demurrers were filed and ruled on. The chancellor sustained Mrs. Burford's de-

[McDowell et al. v. Brantley et al. ; Brantley et al. v. Burford, Adm'x.] murrer, and overruled McDowell's. By cross assignments of error, each ruling is brought before us.

McDowell's demurrer raises two questions which we will notice. The first is, misjoinder of parties complainant; Mrs. Brantley's interest being that of a tenant for life, and her children tenants in remainder. Each and all of them have a common interest that the fund be recovered and safely invested—Mrs. Brantley, that she may secure the payment of its annual interest to her during her life; and her children, that the principal be equally divided among them at their mother's death. There is nothing in this objection.—*Werborn v. Austin*, 77 Ala. 381; 1 Perry on Trusts, § 175.

The second objection is, that the bill fails to show the death or removal of Lewis W. McMillan, alternate testamentary trustee, and fails to show he refused to qualify as such trustee. From this absence of averment, it is contended that the present bill is fatally defective in not showing a case had arisen which conferred on the register jurisdiction to make the appointment of trustee, under which Dawson qualified and received the trust fund. The will has constituted James A. McMillan trustee, and in the event of his death or resignation, it appointed Lewis W. McMillan to execute the trust. The bill avers that James A. McMillan assumed the trust, and subsequently resigned, settling up his accounts. It offers no excuse why Lewis W. McMillan did not take upon himself the trusteeship. It is not shown whether or not Lewis W. was in life when the vacancy occurred, and this record makes no mention of any claim by him to the alternate right the will had conferred on him to administer the trust. We need not consider what would be Lewis McMillan's rights, if he were complaining that they had been disregarded. We have no such case. Dawson petitioned for the appointment, and it was conferred on him at his request. He qualified by giving bond, and received the trust funds. Both he and his sureties are estopped from denying his liability to account for them. There is nothing in McDowell's assignment of errors.

The bill avers that Dawson was appointed trustee in January, 1877, and gave bond for the faithful administration of the trust, with McDowell and Burford as his sureties; that in March, 1877, Burford died, and in April, 1877, Mrs. M. M. Burford, his widow, was appointed administratrix of his estate. She is made a defendant to this suit as such administratrix. There is no averment in the bill that this claim had ever been presented to her for payment, or that it had been filed in the probate court as a claim against the estate. By her demurrer she interposes the defense, known in our jurisprudence as non-claim. If under the facts this defense is available to her, she

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can raise it by demurrer, when the bill on its face shows a state of facts which requires presentation, and fails to aver such presentation was made.—*Owens v. Corbett*, 57 Ala. 92; *Fretwell v. McLemore*, 52 Ala. 124. Was this a claim which required presentation?

The decision of this question depends on the construction of section 2597 of the Code of 1876, which is in the following language: "All claims against the estate of a deceased person must be presented within eighteen months after the same have accrued, or within eighteen months after the grant of letters testamentary, or of administration; and if not presented within that time are forever barred." Was the demand asserted in this bill a "claim" which could have been presented? A claim, in the sense here used, is almost the synonym of moneyed demand; for it is required to be presented, only when money is claimed to be due. It has no reference to property alleged to be withheld. It must be payable in money, although it is not necessary it should be due and payable presently. A debt not yet due is a claim within the meaning of this statute. It is the asserted liability of decedent and his estate to pay a sum of money.—*Bouvier*, Law Dic. "A demand as of right." *Worcester's Dic.* "A demand of a right, or supposed right." *Webster's Dic.* "A calling on another for something due, or supposed to be due."—*Imperial Dic.*

The statute we are considering has been in force in this State a great many years. It was intended to facilitate a safe and speedy settlement of estates, by furnishing the personal representative the means of determining its financial *status* within eighteen months after his appointment. Hence, all claims which had accrued were required to be presented within that time, with an exception of claims in favor of minors and persons of unsound mind, who were allowed eighteen months after the removal of their respective disabilities.—Code, § 2598. Very many rulings have been made on this statute.—*Jones v. Lightfoot*, 10 Ala. 9; *Foster v. Holland*, 56 Ala. 474; *Fretwell v. McLemore*, 52 Ala. 124; *Owens v. Corbett*, 57 Ala. 92; *McDowell v. Jones*, 58 Ala. 25; *Rhodes v. Hannah*, 66 Ala. 215; *Yniestra v. Tarleton*, 67 Ala. 126; *Taylor v. Robinson*, 69 Ala. 269; *Jones v. Drewry*, 72 Ala. 311.

The case of *Neil v. Cunningham*, 2 Porter, 171, was that of a surety on a bond of indemnity. More than eighteen months had elapsed after administration was granted on the estate of the surety, and there had been no presentation. Subsequently the liability of the principal was fixed, and it was held the statutory bar did not commence running until the principal committed the default, for redress of which the suit was brought. In *Pinkston v. Hine*, 9 Ala. 252, a bond was

[McDowell et al. v. Brantley et al. ; Brantley et al. v. Burford, Adm'x.] given by Clisby, with Gauze as surety, that title should be made to a tract of land when Hine became of age. More than eighteen months before that time Gauze died, and Pinkston became his administrator. There was no presentation until after Hine became of age, and the statute of non-claim was pleaded. It was held the claim did not accrue until Hine came of age, and that the demurrer to that plea was properly sustained. In *Jones v. Lightfoot*, 10 Ala. 17, it was said: "There are doubtless cases of contingent liability, which may never accrue, and which, therefore, there is no necessity to present to the personal representative." In *Fretwell v. McLemore*, 52 Ala. 124, this court said: "The judicial ascertainment creates the cause of action against the surety, authorizing the enforcement of the liability imposed by the bond." In that case "the period prescribed by the statutes, as that within which the distributees could claim distribution, having arrived," it was held that there was a claim against the intestate—that a liability originating on the bond had accrued—and the plea of the statute of non-claim was held good. So, in *McDowell v. Jones*, 58 Ala. 25, we said: "There may be contracts involving only contingent liability, or dependent upon the future performance, or the happening of some particular event, of some act or duty by the person to whom the promise is made, or by some other person, not falling within the operation of the statute. Or, there may be claims not within the operation, because they do not accrue until the doing of some act by another, after the grant of administration. When the act is done and the claim has accrued, the bar of the statute is computed, not from the grant of administration, but from the act and the accrual of the claim. * * * The liability of a surety on an administration bond is contingent, until the principal shall fail in the performance of a duty required of him by law."

The bond in this case, like the bonds of public officers, executors, administrators and guardians, was an obligation to do certain duties and execute certain trusts, which might, in their administration, run through many years. If presentation were required in such cases before actual default committed, it could only be of the penalty of the bond—nothing more definite, and nothing less in amount. In the present case, the claim would have been eight thousand dollars, the penalty of the bond. This, too, at a time when there was no known default, and, for aught that we can know, there was in fact no default. The bill shows no default until January, 1884. The profession know well what effects the presentation of claims have on administrations. They generally tie up the assets, delay disbursements and distributions, and frequently lead—

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rightfully lead—to report of insolvency, order for sale of real estate, and many other consequences not necessary to be mentioned. And, in such a case as this, all these consequences might be entailed on the administration, and for an unknown number of years, when there was in fact no default, and no claim had accrued. The legislature can not be supposed to have contemplated or intended such results as these.

A question very like the one we are considering arises in determining what claims are, and what are not provable against a bankrupt's estate. The claim set up in this suit, until default by the trustee, could not have been proved and allowed in bankruptcy.—*Steele v. Graves*, 68 Ala. 21; *Loring v. Kendall*, 1 Gray, 305; *Ellis v. Ham*, 28 Me. 385; *Fowler v. Kendall*, 44 Me. 448; *Pogue v. Joyner*, 1 Eng. (Ark.) 241.

Mrs. Burford's demurrer ought to have been overruled, and the result is that on Mrs. Brantley's assignments of error the decree of the chancellor is reversed.

Reversed and remanded.

Beggs & Son v. Arnotte.

Action on Promissory Note by Payee against Maker.

1. *Action by payee against maker of promissory note; sufficiency of complaint.*—In an action on a promissory note, "by payee against maker," a complaint in the form prescribed by the Code (Form No. 4, p. 701) is sufficient to support a judgment by default.

APPEAL from Jefferson Circuit Court.

Tried before Hon. S. H. SPOTT.

The complaint in this case was in these words: "William Arnotte, plaintiff, v. H. T. Beggs & Son, a firm composed of H. T. Beggs and —. Beggs, defendants."

"The plaintiff claims of the defendants the sum of sixty-nine and 30-100 dollars due by due bill made by defendants the 31st day of January, 1884, and payable on the — day of —, 1884, with interest."

A judgment by default was rendered against defendants at the Fall term of said court. This judgment is here assigned by appellants as error.

R. H. PEARSON, for appellants. The cause of action, as set out in the complaint, did not authorize a judgment by default. The complaint fails to show when or where the demand was

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payable, or to whom it was payable, or who was the owner of the claim.—*Douglas v. Beasley*, 40 Ala. 142.

SOMERVILLE, J.—The complaint was in the form prescribed by the Code for a suit “on a promissory note by payee against maker,” and contained a cause of action sufficiently substantial to support a judgment by default against the maker. The precise point has been several times settled by this court.—*Letondal v. Huguenin*, 26 Ala. 552; *Cummings v. Richards*, 32 Ala. 459; Code, 1876, Form No. 4, p. 701.

The case of *Douglas v. Beasley*, 40 Ala. 142, relied on by appellants' counsel, does not conflict with this view. The action there was one by the assignee of a promissory note, and the complaint failed to aver the fact of assignment, or to contain any other averment showing the plaintiff's ownership of the note.

Affirmed.

Allen, Ex'r, v. Allen.

Bill in Equity by Widow to charge Estate of her Deceased Husband with Rents, Income and Profits derived from her Equitable Separate Estate, and Collected by Him.

1. *Power of wife over rents, income and profits of her equitable separate estate.*—As to the rents, income and profits of the wife's equitable estate, she is entitled to receive and control them herself, without any interference on the part of her husband; but she may give them to him, as she might to any other person; and if, while they are living together, she allows him to receive the rents, income and profits, without objection, a gift to him will be presumed, and she can not charge his estate after death.

2. *Same; liability of husband's estate to account for use and occupation of wife's house.*—As to the rents and dividends of the wife's property actually received by the husband in this case, the proof showing that she always claimed them, and that he admitted her claim, and promised to pay it, she is entitled to a decree against his estate; but as to the husband's liability for the use and occupation of the wife's house, in common with her and the other members of their family, if such claim could be allowed in any case, “it would require much clearer and stronger proof than is shown in this case.”

APPEAL from Jefferson Chancery Court.

Heard before Hon. THOMAS COBBS.

This cause was before the court at a former term.—*Allen v. Terry*, 73 Ala. 123. The facts sufficiently appear from the opinion taken in connection with the previous report.

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HEWITT, WALKER & PORTER, for appellants.

JAMES J. GARRETT, *contra*.

STONE, C. J.—There can be no question that the deed of conveyance from Robert Allen to John T. Terry, trustee, for the use and benefit of Mrs. Virginia Z. Allen, bearing the date of January 26, 1875, excluded the marital rights of the former, and vested in the latter, his then wife, an equitable separate estate, secured to her “sole and separate use, benefit and behoof.” The deed conveyed ten shares in a cotton factory, about which the present record presents but little contention. It also conveyed a two thirds interest in a house and lot in the city of Birmingham. The house in its lower floor consisted of stores, and the upper rooms were adapted to hotel or boarding house uses. The stores were sometimes rented, sometimes unoccupied, and one of them was at one time occupied by Robert Allen, in the sale of merchandise. The upper rooms were part of the time, occupied by Robert Allen as a hotel, in which he and his family resided. At another time these rooms were let to rent, Allen and his family occupying some of the rooms, and being boarded by their tenant in part payment of rent. For a part of the time no rent was realized. Between the time when Robert Allen conveyed the two thirds interest in the property to Terry, for the sole and separate use of Mrs. Allen, and the death of the former, there was a period of about four years. The object of the present bill, filed by Mrs. Allen the widow, is to recover from the estate of Robert Allen the rents of the said property that were realized, and for the use and occupation of the property, from the time the deed of settlement was made, February 26, 1872, until the death of her husband, four years afterwards. Terry was first made a co-complainant with Mrs. Allen; but being trustee of a dry trust, charged with no duties, the bill was amended by striking out his name, and Mrs. Allen was left as sole complainant.

This case was before us at a former term. *Allen v. Terry*, 73 Ala. 123. The amendment referred to above was made after the case returned from this court. We ruled on that appeal, in reference to the rents, income and profits of the wife's equitable separate estate, that “she is entitled to receive and control them herself, free from any interference of her husband; but we said she may give them to the husband, as she may to any other person, under her general power of disposition. Hence,” we added, “it has been held that if the husband, while living with her, receives such income and profits, it will be presumed, in the absence of an express dis-

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sent on her part, that they were received by her consent, and they will be regarded as a gift to him." We added: "This was the settled doctrine of the English Courts of Chancery; and from it followed the mere corollary, that where such gift was express or implied, the wife was precluded, after the death of the husband, from charging his estate with what he had received." In this we only followed the English authorities, and the ruling of this court in *Roper v. Roper*, 29 Ala. 247; See *Gordon v. Tweedy*, 71 Ala. 202, 213; *Newlin v. McAfee*, 64 Ala. 357.

Mr. Terry, who testifies very fully, proves that Mrs. Allen, on several occasions, complained that *she* did not, while her husband *did* collect and realize the dividends on her stock in the cotton factory, and the rents and income of her real estate. These, she desired, should be invested in a lot and residence for herself. Mr. Terry had interviews with Mr. Allen in reference to these claims, but the latter pleaded inability then to pay, but promised that he would pay when able. These interviews and this testimony refer to the dividends actually collected and the moneys actually realized from rents. Nothing said by him tends to show that any reference was had to the mere use and occupation of the property by Mr. Allen and his family. Nor does he prove that Mrs. Allen ever complained of her husband's occupation of her property. The other witness, Miss Philips, who testifies on this subject, makes no satisfactory proof that Mrs. Allen objected to the property being occupied by the family, herself included, and fails to satisfy us that the wife claimed rents for her husband's occupation, or that he promised to pay her for such use and occupation. The remark imputed to Mr. Allen, when he was lying sick, is too indefinite and ambiguous to found positive relief upon. We hold that complainant, as to her claim for use and occupation, has not overcome the presumption of a gift, even if under any circumstances she could recover from her husband for their joint use and occupation of property secured to her sole and separate use.

We think the dividends and rents of the property actually received and collected by Mr. Allen, and not accounted for, stand on a very different footing from the use and occupation of the property by Mr. Allen, or by him and his family. As to the former, the proof is clear that Mrs. Allen claimed it, and that Mr. Allen admitted the claim, and promised to pay it. For this his estate is liable. As to the use and occupation, Mrs. Allen enjoyed it in common with her husband, and there is no satisfactory proof that she ever claimed compensation for it. If in any case a wife, using or occupying her equitable separate property, with her husband, and enjoy-

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ing with him such use and occupation as a common home, and as a common source of support, can claim from him, or from his estate, hire or rent for such use and occupation, it should require a much clearer case, and much stronger proof than are shown in this case. *Moore v. Ferguson*, 2 Munf. 421; *Powell v. Hanke*, 2 Pre. Wms. 82; *Crockett v. Lich*, 74 Ala. 301; *McQueen H. & W.* *298, *299; *Dalbiac v. Dalbiac*, 16 Ves. 116; *McGlinsey's Appeal*, 14 Serg. 64; *Shirley v. Shirley*, 9 Paige 363; *Meth. Eps. Ch. v. Jaques*, 3 Johns. Ch. 77; *Clancy H. & W.* 364; *Gordon v. Tweedy*, 71 Ala. 202; *Allen v. Terry*, 73 Ala. 123; *Cram v. Brice*, 7 M. & W. 183.

The special register reported two hundred and twenty five dollars as the sum, and only sum of rents collected by Robert Allen. There was no exception to his report, and it should have been affirmed.

The decree of the chancellor is reversed, and a decree here rendered, directing the special register to report an account with interest, charging the estate of Robert Allen with the dividends collected by him on the ten shares in a cotton factory, and with the two hundred and twenty five dollars, rent collected, or such part as is due to the two-thirds interest owned by Allen. Against this he will allow as credits, also with interest, the sums expended by Robert Allen in repairs and improvements. The taxes paid by him stand on a somewhat different footing. We think we do substantial justice by allowing him credit for one half the taxes paid by him, with interest, and we so order. This order as to interest, and the recovery of taxes, is made on the peculiar facts of this case.

Reversed and rendered.

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Action for False Imprisonment.

1. *Arrest by town marshal for breach or attempted breach of peace; prisoner has no right to select officer before whom he will be tried.*—A person arrested by a town marshal, for a breach or attempted breach of the peace committed in his presence, has no right to select the officer before whom he will be tried, nor can he object to being brought to trial before the mayor or intendant of the town.

2. *Actual breach of the peace not necessary to justify arrest by marshal; may act on appearances, and arrest to prevent threatened breach.*—In the performance of his duty to prevent threatened breaches of the peace, a town marshal, or other municipal police officer, may act on the reasonable

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appearance of things, and make arrests before an actual breach of the peace is committed; and he may justify on the ground of such reasonable apprehension of violence, when sued for the arrest.

APPEAL from Calhoun Circuit Court.

Tried before Hon. L. F. Box.

This was an action for damages by Wiley Mitchell against J. M. Hayes for an alleged false imprisonment and was commenced on 22d September, 1874. The appellant, Hayes, as marshal of the town of Oxford, and under color of his official authority as such, arrested the appellee, Mitchell, and incarcerated him in the calaboose, or town prison. The circumstances which led to the arrest and detention of the plaintiff, and the defense presented by the pleas of the said Hayes are detailed in the previous report of this case (*Hayes v. Mitchell*, 69 Ala. 452). The assignments of error relate to the giving of the charges requested by the plaintiff, and the refusal of the instructions requested by the defendant. The court charged the jury as follows at the instance of the plaintiff: "(1) In this case the court charges the jury that there should be no imprisonment unless the circumstances rendered the imprisonment necessary." "(2) If the jury believe from the evidence that the arrest in this case was made at a reasonable hour in the day for a trial, and if the jury further believe from the evidence that the mayor and his office were both accessible, and that there were no rioters or riotous conduct either actual or threatened, by others at the time, then it was the duty of the defendant as marshal to carry the plaintiff (if he had threatened to violate the peace) before the mayor for trial; and to imprison without such trial under such state of facts was without authority of law." The following instructions requested by the defendant were refused by the court: "(1) The court charges the jury that if they believe from the evidence that the defendant, as marshal, had probable cause for arresting the plaintiff and detaining him in prison, then they must find for the defendant under the complaint in this case although they may believe from the evidence there was actually no assault or threatened breach of the peace." "(2) The court charges the jury that if they believe from the evidence that the plaintiff refused to be tried by intendant Kelly, and that he would have refused to have been tried by said intendant at any and all times between the time he was arrested until he was discharged, then this would excuse the defendant as marshal from taking him before the said intendant for trial." "(3) The court charges the jury that in order to excuse the defendant for not bringing the plaintiff before the intendant, Kelly, if the jury believe from the evidence that plaintiff committed an assault, or threatened

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a breach of the peace in defendant's presence, it is not necessary that there should be any breach of the peace or any disturbance in the town of Oxford, while and during the time the plaintiff was in prison." The following charge was not numbered: "The necessity for the defendant to be on the streets in the discharge of his duties as marshal, while plaintiff was in prison, need not be actual, but if there was an apparent necessity it will be sufficient although in fact no disturbance occurred during the time."

The defendant duly excepted to the rulings of the court as embodied in the above charges and the same are here assigned as error.

ELLIS & DENSON, for appellant, cited *Hayes v. Mitchell*, 69 Ala. 452.

CALDWELL, HAMES & CALDWELL, and J. T. MARTIN, *contra*.

STONE, C. J.—The first and second charges given by the court at the request of the plaintiff below are in strict conformity with the rules we declared, when this case was before us at a former term. *Hayes v. Mitchell*, 69 Ala. 452.

In reference to the charges asked by defendant and refused. Mitchell, when arrested, had no right to select the officer before whom he would be tried, nor, to object to being brought to trial before the mayor or intendant of the town. Sess. Acts 1859-60, § 6, on p. 384; Sess. Acts 1875-6, p. 315. Charge No. 2 was rightly refused. Charge No. 3 was, in some respects, not full enough, was calculated to mislead, and was rightly refused on that account.

The last charge asked—not numbered in the transcript—should have been given. Part of the testimony tended to show that, on the day in question, there was drunkenness, noise and riotous conduct on the streets of Oxford. If this was believed, it afforded a good reason why the marshal should have been on the streets, ready to exercise his functions if needed, and untrammelled by any incumbrance. And it was not necessary that the danger should be real. Reasonable ground for apprehending that there would or might be a breach or disturbance of the peace, would make it his duty to be present, that he might prevent violations of the law. Apparent necessity, on a reasonable survey of the surroundings, is, as an excuse, as valid as if it were real. Preventive measures, to be effective, must be taken on the reasonable appearance of things. It is too late, after the mischief is accomplished. *Mitchell v. The State*, 60 Ala. 26; *Rogers v. The State*, 62 Ala. 170.

The first charge asked, in view of the testimony, was scarcely

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full enough. Technically it may be correct, but it was not sufficiently explicit. Two acts were charged against the plaintiff, the arrest, and the imprisonment. To authorize a verdict in his favor, the duty was cast on him of giving a sufficient excuse for each. We showed, when this case was formerly before us, what conditions would justify incarceration. We have repeated above, the surroundings which would justify an arrest without warrant. We have added, that reasonable appearances are as much an excuse for the conduct complained of in this suit, as actual realities are. These are the principles of law which must determine this case.

Reversed and remanded.

Watts v. Frazer.

Bill in Equity to Re-open Settlement of Accounts of Administratrix, and remove Settlement into Chancery Court.

1. *Bill in the alternative.*—A bill can not ask, in the alternative, either to set aside a probate decree on the ground of fraud, or to correct alleged errors of law and fact in it.

2. *Relief in equity against judgment at law, or decree of Probate Court, on the ground of fraud.*—To justify relief in equity against a judgment at law, or decree of the Probate Court, on the ground of fraud, the alleged fraud must have been practiced in the rendition or procurement of the judgment, and it is not sufficient to show fraud in antecedent transactions, which would have constituted a good defense against the judgment.

3. *Bill seeking to correct errors of law and fact in probate decree; when presumption can not be indulged against regularity of decree.*—When the bill seeks to correct errors of law and fact in a probate decree, rendered on the settlement of an administrator's accounts, which is not set out, nor any errors or defects specified, but which is designated as "what purports to be a final settlement," no presumption can be indulged against the regularity of the decree; and the general averment that there had never been any final settlement, in the absence of facts supporting the averment, is not sufficient, being the mere statement of a legal conclusion.

4. *Judgment or decree against minor represented by guardian ad litem.* A minor, when represented by a guardian *ad litem*, is as much bound by a judgment or decree as an adult; and an averment of the complainant's infancy at the rendition of a decree on the settlement of an administrator's accounts, without an additional averment that he was not represented by guardian *ad litem*, shows no equitable ground for relief against it.

5. *Jurisdiction of Probate Court to order sale of decedent's lands; when proceedings can not be collaterally impeached.*—The Probate Court acquires jurisdiction to order a sale of a decedent's lands, on the filing of a petition by a proper person, setting forth a statutory ground of sale;

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and when the jurisdiction has thus attached, the proceedings can not be collaterally impeached on account of mere irregularities or errors.

6. *Same; when order of sale void and the sale a nullity.*—If the jurisdiction of the court never attached, the order of sale is void, and the sale a nullity; and the remedy at law to recover the land being plain and adequate, the heirs can not come into equity to set aside the sale.

APPEAL from Bullock Chancery Court.

Heard before Hon. JNO. A. FOSTER.

This was a bill in equity exhibited on 25th August, 1883, by Gertrude Watts, by her next friend, P. C. Watts, against Catherine McRae, Houghton & Lasseter, R. G. Wright, S. T. Frazer, and others, and averred in substance: That complainant's father, Dawson McRae, died intestate in said county in September, 1868, leaving a large real and personal estate, comparatively free from debt; that respondent, Catherine McRae, the widow of decedent and the mother of complainant, was appointed administratrix of said estate, and executed a bond as such, with Frazer, Wright and others as her sureties, in the sum of \$30,000.00, and duly entered upon said administration; that said administratrix made, "what purported to be," partial or annual settlements in October, 1869, May, 1871, and March, 1874, and an alleged final settlement in May, 1876, at which latter date the complainant was a minor not over ten years of age; that numerous errors, which are specifically pointed out in the bill, entered into each of the settlements; that said administratrix contracted a large number of debts which were not valid claims against the estate; and, to pay a portion of such indebtedness, due to the respondents Wright & Frazer, procured a sale to them of a part of her intestate's realty, said respondents knowing at the time that said estate was free from debt; that other lands belonging to the estate were likewise sold, under an order of sale procured from the Probate Court, to satisfy a personal and individual debt of the administratrix due to the respondents Houghton & Lasseter, which constituted no claim against said estate; that "the various errors in said several settlements were unknown to oratrix until within the last three months. She was so young, and of such tender age, that she did not and could not, have any knowledge of such matters." The bill further avers that "in truth there has never been any final settlement of the estate of Dawson A. McRae; that the assets of the estate have never been administered in full," and prays that said administration be removed from the Probate to the Chancery Court, and that the various settlements be set aside and held for naught; that the sales to Wright & Frazer, and Houghton & Lasseter be set aside, and that they be compelled to account for the use and rents of said lands since they entered into the possession thereof, and

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for other relief in accordance with the allegations of the bill.

Answers were filed by all the respondents above mentioned, incorporating demurrers to the bill, the defenses presented by which, it is not deemed necessary to notice with particularity, in view of the opinion of the court. The present appeal is prosecuted from the decree of the chancellor dismissing the bill, the decree of dismissal being here assigned as error.

WATTS & SON, for appellant.

FLEMING LAW, and POWELL & CABANISS, *contra*.

SOMERVILLE, J.—It is difficult to say whether the present bill is to be construed as one seeking to vacate a judgment of the Probate Court, rendered upon the settlement of the administration in question, upon the ground of fraud, or whether its purpose is to correct errors of law and fact, which are alleged to have occurred in the settlement of the estate, under the provisions of section 3837 of the Code of 1876. It would seem that these two aspects can not be united in the same suit in the alternative, for the reason that each alternative averment could not be the foundation for the same kind or character of relief, and the same defense could not be applicable to each. In the first aspect, the judgment assailed successfully for fraud could be set aside as a nullity, and the case retried on its merits. In the second aspect, the specific errors pointed out would be corrected, but the judgment as thus modified would stand unimpeached in its legal validity.—*Gordon v. Ross*, 63 Ala. 363. Such a bill would, perhaps, be multifarious and subject to demurrer on this ground.—*Moog v. Talcott*, 72 Ala. 210; *Lehman v. Meyer*, 67 Ala. 396; *Gordon v. Ross*, *supra*.

There are no facts alleged in the bill, however, which show any fraud practiced in the rendition or procurement of the judgment, or, as said by Mr. Story, “in the very act of obtaining the judgment” or in its “concoction.”—3 Story’s Eq. Jur. § 1575; *Noble v. Moses*, 74 Ala. 604, 616. Fraud as to transactions antecedent to the judgment, such as would have constituted a good defense to the rendition of the judgment, but not connected with the proceedings by which it was obtained, is deemed insufficient to justify relief under the head of this equitable ground of jurisdiction. There is averred no misrepresentation of fact, or either actual or positive fraud, on the part of the administratrix, by means of which the judgment was procured to be rendered. Many errors of receipts and disbursements are shown—many errors of debit and credit—with failures on the part of the administratrix to charge herself with amounts for which she was legally liable upon the settle-

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ment, but objections to these matters would have been available in the Probate Court, and no fraud, accident, or mistake is proved which operated to prevent such defense from being made in that form.—*Noble v. Moses*, *supra*; *Crommelin v. McCauley*, 67 Ala. 547; *Mock v. Steele*, 34 Ala. 198; *Waring v. Lewis*, 53 Ala. 615, 621.

The bill is equally defective if treated as one to correct errors of law and fact alleged to have occurred in the settlement of the estate to the injury of the complainant. Such a bill will lie only where the errors complained of are shown to have occurred "without fault or neglect" on the part of the complainant.—Code, 1876, § 3837. The averment made is that there had been in the probate court what "purports to be a final settlement" of the estate. The judgment is not set out so that its defects, if any, may be judicially determined. No fact is stated, or reason given, showing why such settlement is not what it purports to be—that is, final. The Probate Court, being a court of general jurisdiction in making such settlements, the presumption is favorable to the fact of jurisdiction, and every legal intendment will be made in its favor. Nothing can or will be presumed against the regularity or legality of its action. The concluding averment in the bill that there had never been any final settlement of the estate must be taken to be the statement of a mere legal conclusion of the pleader, in the absence of facts supporting such a broad allegation. The facts previously stated show there had been such a settlement. *Acklen v. Goodman*, 77 Ala. 521; *Steele v. Tutwiler*, 67 Ala. 107; *Alexander v. Alexander*, 70 Ala. 357.

This presumption of regularity is not rebutted by the fact that the complainant was a minor at the time of the settlement. The bill does not negative the presumption that she was represented by a guardian *ad litem* as required by law. And a minor thus represented is as much bound by the judgment or decree of a Probate or Chancery Court as an adult would be. *Stabler v. Cook*, 57 Ala. 23; *Jones v. Fellows*, 58 Ala. 343. *Waring v. Lewis*, 53 Ala. 620.

There is no error pointed out in the bill, as having occurred in the settlement sought to be impeached, for the correction of which the Probate Court could not have furnished an adequate remedy upon the occasion of the settlement, and prior to the rendition of the judgment. No fact or reason is averred showing that the complainant was without fault or neglect in making her defense in the Probate Court through her guardian *ad litem*.—*Cawthorn v. Jones*, 73 Ala. 82; *Massey v. Modawell*, 73 Ala. 44; *Waring v. Lewis*, 53 Ala. 615; *Alexander v. Alexander*, 70 Ala. 357.

The averments of the bill, apart from all objection to this

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feature on the ground of multifariousness, fall entirely short of showing any want of jurisdiction in the Probate Court to make sale of the lands of the decedent. Jurisdiction to sell attached upon the filing of the petition by the proper person, setting forth the statutory grounds of sale, and the action of the court granting the order of sale was conclusive as to the existence of debts due by the decedent, as well as of the insufficiency of personal assets to satisfy such debts. Such a judgment, as we have uniformly held, can not be collaterally impeached for mere irregularities or reversible errors.—*Foxworth v. White*, 72 Ala. 224; *Landford v. Dunklin*, 71 Ala. 594; *Farley v. Dunklin*, 76 Ala. 530. If, moreover, the order of sale was void, the complainant could obtain no relief in equity, because her remedy at law would be plain and adequate.

The bill was, in our opinion, without equity, and was properly dismissed by the chancellor.

Affirmed.

CLOPTON, J., *not sitting*.

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Action for Damages by Drawees of Bill of Exchange against Holders.

1. *Action; legal injury the basis of.*—An act can not be the foundation of an action, unless it constitutes a legal injury; and what one man has a right to do, another can have no right to complain of.

2. *Waiver of protest; holder may protest notwithstanding.*—Notwithstanding a waiver of protest, the holder of a bill of exchange may have it protested, if he desires to claim the statutory damages for non-acceptance or non-payment.

3. *Same.*—The drawees of a bill of exchange can not maintain an action against the holder, for having the bill protested after waiver of protest by the drawer and indorsers.

APPEAL from the Circuit Court of Etowah.

Tried before Hon. JAMES AIKEN.

This was an action for damages by Bellinger & Ralls, a mercantile firm of Gadsden, Ala., against Glenn, Brockway & Co., bankers; and was commenced on 13th January, 1885. In the usual course of their business the defendants received, for collection, a draft, or bill of exchange, for a designated amount, drawn on the plaintiffs by the Ballard & Ballard Co., of Lou-

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isville, Ky. The draft was endorsed successively to the Kentucky National Bank of Louisville and the First National Bank of Nashville, and by the latter transmitted to the defendants for collection. The plaintiffs' suit is founded on the alleged injury to their commercial credit and reputation, caused by the action of the defendants in protesting this instrument despite an express waiver of such protest embodied therein, in the following words: "The parties hereto waive protest and notice thereof." The defendants demurred to the complaint upon the ground, *inter alia*, "that the matters and things set forth in said complaint do not constitute any right of action in the plaintiffs against the defendants." The judgment of the court sustaining the demurrer is here assigned as error.

DUNLAP & DORTCH, and AIKEN & MARTIN, for appellants.

W. H. DENSON, and JAMES L. TANNER, for appellees, cited *Strong v. Campbell*, 11 Barbour, N. Y. Rep. 135; *Bank Rome v. Mott*, 17 Wendell, 554, 556; *South Royalton Bank v. Suffolk Bank*, 27 Ver'm't, 505; *Smith v. Bowler*, 2 Disney (Ohio), 153-156; *Week's Damnum Absque Injuria*, § 5; Moak's Underhill on Torts, p. 4; *Mobile Ins. Co. v. Randall*, 74 Ala. 178; *Central R. R. Banking Co. v. Lampley*, 76 Ala. 357, 364; *Trust Co. v. Nat'l Bank*, 101 U. S. 68-71; 1 Parsons' Con. pp. 263-271; *Thompson v. Bank S. Carolina*, 30 Am. Dec. 354-356; 1 Parsons' Con. 263-268-269; *Allen v. Suydam*, 32 Am. Dec. 557; *Fabens v. Bank*, 34 Am. Dec. 59; *Bowling v. Harrison*, 6 Howard, 258; Cooley on Torts, p. 81.

CLOPTON, J.—To give a right of action for a tort, the act complained of must be wrong in itself, or become so by reason of the consequences which ensue. With whatever intent an act may be done, it can not be the foundation of an action, unless it constitutes a legal injury. "Whatever one has a right to do, another can have no right to complain of." The waiver of protest and notice applied only to the drawers and endorsers. It conferred no right on the plaintiffs, who had not accepted the bill and were not parties to it, and imposed no duty on the defendants as to them. It is lawful for the holder of a bill, notwithstanding protest may be waived, to have it protested, if he deems such advisable, or desires to claim the statutory damages for non-acceptance or non-payment. On the allegations of the complaint, the protest was not a wrong to the plaintiffs, could not have done them any damage, and gave them no right of action. The substantial elements of a cause of action—wrong and damage—are wanting.

Affirmed.

Garrett v. Robinson.*Bill in Equity for Settlement of Partnership Accounts after
Dissolution.*

1. *Mode of stating partnership accounts by register.*—In the statement of a partnership account, which involves items of debit or credit against or in favor of one or both of the partners, it is erroneous to state the account in debtor and creditor form as between the partners individually; but the account of each partner with the partnership should be first stated, and then the account between the partners individually on the basis of that result, one-half of the indebtedness of either to the firm being the amount of his indebtedness to the other; and individual debts paid by one for the other, should be charged in the individual account.

APPEAL from the Chancery Court of Monroe.

Heard before the Hon. JNO. A. FOSTER.

The bill in this cause sought a settlement of partnership accounts between the complainant, Robinson, and Caswell Garrett, late partners equally interested in the operation of a saw and grist-mill in said county; and was filed on 11th June, 1883. The respondent having answered, the chancellor ordered a reference of the matters of account to the register. The register, in executing the reference, stated the account "in debtor and creditor form" between the complainant, Robinson, on the one side and the appellant, Garrett, on the other, and showed a balance of \$318.00 in favor of the complainant. The register's mode of stating the account, and the overruling by the chancellor of sundry exceptions taken by the respondent to the report, are here assigned as error.

FARNHAM & RABB, for appellant.

S. J. CUMMING, *contra*.

STONE, C. J.—Stated as the account was in this case, it was and is impossible to reach correct conclusions, and the whole report should have been set aside, and a re-reference awarded, with instructions. In the settlement of a partnership account which involves items of debit and credit against one, or each of the partners, a simple accounting in which one partner is set down as a creditor, and the other as a debtor, can never lead to correct results. This, for the obvious reason that in the

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partnership dealings, neither credits nor debits constitute a liability from one to the other. They are credits payable by, and debts due to the firm or partnership. Whether one owes anything to the other or not, does not depend on the amount of the partnership effects he may have received, consumed, or utilized. It depends on the excess of receipts above disbursements on partnership account one may have enjoyed in greater amount than the other, or, on the excess of expenditures for the firm beyond receipts, one may have paid out to a greater extent than the other. To illustrate: Suppose A. & B. are equal partners. A receives of the firm effects ten thousand dollars, and expends for the partnership nine thousand. B. receives one thousand, and expends nothing. Each would have enjoyed one thousand dollars of profit, and neither would owe anything to his co-partner, nor to the firm. The same rule applies when there is a loss. The true result to be arrived at is, that each partner shall receive an equal share of the profits, if there be profits, and each shall sustain an equal amount of the loss, if there be a loss. And if, in taking the account, it be shown that one partner has received or sustained a greater amount of the profit or loss than the other, this does not create a debt from one to the other of a sum equal to the difference. The sum to be paid is one-half the difference, so as to equalize the benefit or burden, as the case may be.

In stating the account, that of each member with the firm must be stated separately. Each must be debited with whatever of the partnership effects have come to his hands. This will include all collections and cash sales made by each, and all partnership effects used by each or converted or applied to individual purposes, or applied with his approval or ratification to his individual uses or debts. He must be credited with all disbursements or expenditures he has made for the firm. In this column of expenditures will be embraced any payment of partnership debts or liabilities, whether made with partnership or individual funds. Robinson will be entitled to a credit in stating his account with the partnership for his proper wages as bookkeeper, and Garrett will be entitled to a credit in his account with the firm for all lumber of his which went into the firm at its formation, and was disposed of by it. He will be charged with the value of the lumber left on the yard at the termination of the partnership, and used by him. The two individual accounts with the firm being thus separately taken, a proper basis will be furnished for stating the account between the partners themselves. And in this third, or final account, each partner must be charged with any individual liability of his, which has been paid or cancelled by the other. The payment alleged to have been made by Garrett to Feagin of the

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balance of the purchase money note given in the purchase of the half interest in the mill, to the extent Garrett paid the same, falls within this category, and entitles him to a corresponding credit in this final accounting with Robinson. If there be other payments by one, of the individual debts of the other, they are governed by the same rule. And, as we have said, whatever difference the account may discover in profits received, or losses sustained, one-half that sum will be the proper decree against the partner who is found to have the advantage. *Collins v. Owen*, 34 Ala. 66.

Several of the exceptions—notably, the first and second filed by the defendant—ought to have been sustained.

Reversed and remanded.

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Trial of Right of Property.

1. *Court may require jury to correct informal verdict.*—When the jury return an informal verdict, the court may require them to retire again and put it in proper form.

2. *Remission by plaintiff in attachment of portion of his recovery; when claimant can not complain.*—The claimants of property attached can not complain of the action of the court in requiring the plaintiff to remit a portion of his recovery, as the only alternative to granting a new trial, since they can not possibly be injured by it.

APPEAL from Calhoun Circuit Court.

Heard before Hon. L. F. Box.

This was a trial of the right of property in certain designated articles of merchandise, on which an attachment had been levied by Clayton & Webb, and a claim interposed, under the statute, by A. L. Higginbotham & Co. The cause was tried on an issue made up under the statute, the trial resulting in a verdict and judgment in favor of the plaintiffs in attachment. The verdict, as first returned, was in the following words: "We, the jury, find for the plaintiffs the goods specified in the levy, to-wit:" (enumerating the several articles and assessing the value of each) "and ten *per cent.* damages." The court thereupon directed the jury to retire and put their verdict in proper form; which was accordingly done, and the amended verdict received against the objection and exception of the claimants. The claimants moved for a new trial, which

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the court consented to grant "unless the plaintiffs would agree to abandon and allow stricken from the verdict and judgment" certain articles covered by their attachment and the ten *per cent.* damages awarded by the jury. The plaintiffs consented to remit this portion of their recovery and the court overruled the claimants' application for a new trial.

The amendment of the verdict is made the basis of appellants' assignments of error.

CALDWELL, HAMES & CALDWELL, for appellants.

G. C. ELLIS, and J. W. BISHOP, *contra*.

SOMERVILLE, J.—The verdict of the jury, as first returned, was obviously informal. No doubt can be entertained as to the right of the court to direct the jury to again retire with the view of putting their verdict in proper form.—*Hughes v. State*, 12 Ala. 658; *Wortham v. Gurley*, 75 Ala. 356.

The action of the court in compelling the plaintiffs to remit a part of their recovery against the defendant as the only alternative to granting a new trial, could not possibly prejudice the appellants, who were claimants of the property levied on under the plaintiffs' writ of attachment. It was rather a benefit to both themselves and the defendants, resulting in reducing the amount of the judgment for the satisfaction of which the property was liable to be condemned.

We find no error in the record of which the appellants have a right to complain, and the judgment is accordingly affirmed.

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Application for Mandamus.

1. *Repleader ; when award of, equivalent to granting new trial.*—Where issue is joined on several insufficient special pleas and on the general issue, and there is a general verdict for the defendant on all the issues; while the bill of exceptions, purporting to set out all the evidence, shows that the plaintiff made out a *prima facie* case, and that the defendant's evidence only supported the insufficient pleas; the award of a repleader, if not technically correct, is the same in substance as granting a new trial, with leave to amend the pleadings, and accomplishes substantial justice.

APPLICATION to this court for a writ of *mandamus*.

The facts are sufficiently stated in the dissenting opinion.

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PARSONS, PEARCE & KELLY, for petitioner.

CALDWELL, HAMES & CALDWELL, and WATTS & SON, *contra*.

CLOPTON, J.—In an action, brought by M. P. Levy & Co. against the petitioner in the Circuit Court for Calhoun county, the defendant pleaded the general issue and three special pleas. Each of the special pleas contained a confession of a cause of action, and alleged in avoidance immaterial and insufficient matter. There was a verdict for the defendant, which was set aside, and a repleader awarded. This is an application for a *mandamus* to have judgment entered on the verdict, and the case stricken from the docket. When a plea contains a confession of a cause of action, and avoids it by presenting an immaterial issue, and there is a verdict for the defendant, the plaintiff is entitled to judgment *non obstante verdicto*; but if the plea does not confess a cause of action, a repleader may be granted. *Lambert v. Taylor*, 4 B. & C. 138; 1 Chitty Pl. 688. Such is the rule at common law, and was of easy application so long as the parties were restricted to a single issue; but since, by statute, the defendant is allowed to plead as many distinct pleas as he may be advised, though inconsistent with each other, thus presenting several issues of fact, a serious difficulty arises as to the application of the rule, when some of the issues are material and others immaterial, and there is a general verdict for the defendant.

In *Wallace v. Barlow*, 3 Bibb. 168, issues were joined on three pleas, two of them being immaterial. It was held, that a material issue having been joined, and a general verdict for the defendant, it should not be set aside and a repleader granted; and that whenever the court can give judgment upon the whole record a repleader should not be awarded; but the finding as to these issues, which could not affect the merits, should be disregarded, and judgment entered on the finding as to the good issue. In *Cullum v. Branch Bank*, 4 Ala. 21, the right of the defendant to have the jury instructed to find a verdict on any issue sustained by his proof is conceded without question, because in such event, the plaintiff could evade the consequence of the verdict founded on an immaterial issue by a motion to enter a judgment *non obstante veredicto*. It is said: "The defendant did not pursue this course, but asked a charge which, if given, would have led to a general verdict, and the plaintiff would, in that case, have been remediless (as under the issue of *non assumpsit*), the reason on which the verdict was founded could not have been ascertained."

In *Mudge v. Treat*, 57 Ala. 1, the rule is thus stated: "A repleader should not be awarded, because of the immateriality

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of one of the issues, after a general verdict on all, some being sufficient, unless it affirmatively appears the verdict was on the immaterial issue only." The logical sequence from these decisions is, that whenever enough exists in the record, not being impertinent or uncertain, on which judgment may be given, the reason for awarding a repleader, when all the issues are on immaterial points, does not apply; and that the statute, allowing several pleas, operates to abrogate the rule, when there is a general verdict on both material and immaterial issues, except in case the entire record affirmatively shows, that the finding was on an immaterial point only.

The bill of exceptions purports to set out all the evidence. It must be conceded, that sufficient appears, if believed by the jury, to entitle the plaintiff to recover; and that the proof offered by defendant only tends to support the immaterial issues. In *Mudge v. Treat, supra*, it was observed, substantially, that had the bill of exceptions negatived the introduction of any evidence supporting any of the material issues, the court would not hesitate to declare that a proper case for a repleader would have been presented. But it must be noted, that the trial court had instructed the jury, their verdict must be for the defendant, if they found the immaterial issue in his favor. We do not understand, it was intended to declare, that the appellate court will determine from an inspection and examination of the proof contained in the record, though it may set out all the evidence, that it affirmatively appears that the verdict was on the immaterial issue only, when there are sufficient pleas, which cast on the plaintiff the burden of establishing his cause of action, and nothing, other than the evidence, appears from the record to indicate such finding. But the exigencies of this case do not require us to decide the extent to which the character of the evidence may be regarded as a controlling consideration, nor what must be shown by the record, in order that a general verdict, there being both sufficient and insufficient pleas, may affirmatively appear to be founded on an immaterial issue only.

The record, as presented, does not disclose what instructions, if any, were given by the court as to the insufficient pleas. The verdict of the jury is set out *in haec verba*: "We the jury find the issues in favor of the defendant." Its terms are responsive to, and comprehensive enough to embrace all the issues, material and immaterial, submitted to the jury. The fair and reasonable interpretation of the verdict is, that the jury found *all* the issues in favor of the defendant. *Tippin v. Petty*, 7 Por. 441. On such a verdict, it cannot be said, that it is founded on any particular issue only, whatever may be our opinion of the state and character of the proof. If such be the

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fact, no means are furnished to ascertain on what particular issue. The general issue is a denial of the cause of action as set forth by the plaintiffs, and devolved on them the *onus* of proving it. The juries are the exclusive judges of the credibility of witnesses, and the sufficiency of evidence. If their finding is contrary to the evidence, resort for the correction of the error must be by a motion for a new trial. It may operate a hardship on the plaintiffs; but violence would be done to the finding of the jury as expressed in the terms of their verdict, were it restricted to the immaterial issues only, by inferences only from the insufficiency of the evidence to support the verdict on the material issue. On the record, a case for a repleader was not presented, and the defendant was not entitled to have judgment entered on the verdict. Otherwise, the effect would be to grant a new trial under the guise of awarding a repleader.

The remaining question is, will *mandamus* lie to compel the Circuit Court to enter judgment? It is an established principle, that a *mandamus* will issue to an inferior court to compel the rendition of a judgment, where such court, having heard and tried the case, refuses to render judgment; but relief will not be granted by *mandamus*, when there is another adequate legal remedy, as when the interlocutory order complained of may be revised and corrected on appeal from the final judgment. *Ex parte S. & N. Ala. R. R. Co.*, 65 Ala. 599. Whether or not a repleader shall be awarded is not a matter in the discretion of the court, and the action of the court relating thereto is revisable. Awarding a repleader is not the same as granting a new trial. They are distinct in their nature and purposes, and constitute different modes of proceeding. *Chapman v. Holding*, 60 Ala. 522. The one is discretionary, not subject to revision. The other does not rest in the discretion of the court, and must be granted or refused on established common law principles; and if error intervenes, it may be corrected by the appellate court. The plaintiff having made a motion for a new trial, which was withdrawn, and afterwards made a motion to set aside the verdict, and for a repleader, elected their remedy, and must submit to its burdens and disadvantages. If a repleader be improperly refused, the plaintiff may appeal from the judgment entered on the verdict, and have the refusal revised. *Mudge v. Treat, supra*. Hence in such case, a *mandamus* will not lie. But if a repleader be improperly awarded, no judgment is entered from which an appeal can be taken. Though the defendant may object, if he subsequently appears, engages in another trial, examines witnesses, and litigates, he waives his objection to the award of the repleader, and is precluded to deny that the case is properly

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pending in court. *Byrd v. McDaniel*, 20 Ala. 582; *Hair v. Moody*, 9 Ala. 399. An appeal from the final judgment would not be an adequate remedy. *Lloyd v. Brinck*, 35 Tex. 1; *Fish v. Neatherwood*, 2 Johns. Cas. 215.

In my opinion the *mandamus* should be granted. But the majority of the court do not concur in this conclusion.

PER CURIAM.—The result of the trial and verdict in this case was a manifest injustice to plaintiffs. The defenses set up were without merit, and the court would have been justified in setting the verdict aside *ex mero motu*, and allowing the pleadings to be amended. We will not say it was not the duty of the court not to do so. One of the chief purposes for which courts are organized is, that while observing the dividing line which separates the duties of the judge from those of the jury, the presiding judge should exert his powers in favor of legal justice. The effect of the order made was precisely the same as the granting of a new trial, with leave to amend the pleadings. Justice was done, and the law regards substance rather than forms, or the name of things. Judgments, correct in substance, should never be reversed because bad reasons are given for them, nor because they are designated by erroneous names.

The majority of the court hold that the *mandamus* must be denied.

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Bill in Equity to Enforce Vendor's Lien.

1. *Sale of lands belonging to tenants in common, one of whom is a lunatic and the other his guardian.*—Where one of two tenants in common has been declared a lunatic, and the other appointed his guardian; if the latter obtains from the Probate Court an order for the sale of the lunatic's interest in the land, it is questionable whether he can rightly make a joint sale of the entire land, or whether such sale, if made, could or would be approved by the court.

2. *Same.*—If he sells his own interest in the land at the same time, to the same purchaser, and at the same price, taking separate notes for the purchase-money, one payable to himself individually, and the other as guardian, he can not unite the two demands in one bill to enforce a vendor's lien on the land.

3. *Bill dismissed on demurrer in term time.*—When a bill is dismissed on demurrer in term time, the complainant must ask leave to amend, if he desires to do so.

4. *Sale of lands by decree under probate court.*—When land is sold by a guardian, under a probate decree, the sale is not complete until confirmation, and the title does not pass until the purchase-money is paid

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(Code, § 2766) ; consequently, the vendor's lien is not waived by taking a note with surety for the agreed price, nor by executing a conveyance prematurely.

APPEAL from Randolph Chancery Court.
Heard before Hon. N. S. GRAHAM.

SMITH & SMITH, for appellants.

DOWDELL & DENSON, *contra*

STONE, C. J.—The bill alleges that the lands, on which a vendor's lien is sought to be established, were owned by the complainant and Cicero J. East as tenants in common, that the latter had been declared a lunatic, and the complainant appointed his guardian. The bill then avers that under an order granted by the Probate Court, complainant had sold the lunatic's undivided half interest in the land, and Elias East became the purchaser at the price of two hundred and twenty-five dollars. It is then averred that at the same time complainant sold the half interest owned by him in his individual right to the same purchaser, and at the same price. Separate notes were taken for the purchase-money of these several interests ; the one payable to T. J. East, guardian of C. J. East, the other to T. J. East, or bearer. The present bill is filed by T. J. East, in the dual capacity of individual and guardian, and seeks to recover the two demands in one suit.

The bill does not aver that the sale of the two interests was made by one contract. The taking of separate notes tends to show the sales were separate. It is difficult to conceive how the two sales could be made by one joint contract. One interest was required to be sold at public outcry, to the highest bidder, after due notice ; the other could be disposed of publicly or privately, at the option of the owner. It is questionable if a joint sale could have been rightfully made, and whether, if so made, the Probate Court could or would approve it. The one is a private contract, between man and man, consummate when the concurrence of the two minds is evidenced by written contract, duly signed, expressing its terms ; the other is a judicial sale, not binding nor complete, until it is approved by the court, under whose authority the sale is made. Be this, however, as it may, the bill not only does not aver there was a joint sale, but, plainly interpreted, avers the contrary. The bill, then, presents the case of two distinct demands, asserted in distinctly different rights, in one and the same suit. This comes up to all the requirements of the rule against multifariousness, and the objection to the bill, original

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and amended, was rightly sustained.—*Lehman v. Meyer*, 67 Ala. 396; *Junkins v. Lovelace*, 72 Ala. 303; 1 Brick. Dig. 719-20; *Bayzor v. Adams*, 80 Ala. —.

The decree being rendered in term time, the complainant, if he desired to amend, should have asked leave to do so. In the absence of such motion, the court did not err in the final decree dismissing the bill.

There will be other proceedings, and we will offer some suggestions on other points. The bill should have averred that the public sale was reported and confirmed, as it is the confirmation which gives the sale validity.

So far as the guardian's interest is concerned, there is nothing in the objection, even if sustained by the pleadings, that the purchaser received a conveyance, and gave security for the purchase-money. * The title, if made before confirmation and the payment of the purchase-money, was improperly made, and did not divest either the title or the lien.—Code of 1876, § 2786.

Nor does the bill sufficiently show security was taken, so as to raise the presumption the lien was waived. It is shown that the alleged surety was the wife of the purchaser. A married woman can make no binding personal contract, nor can she bind her property, unless she has an equitable separate estate, or, is in some other way clothed with the power. *Prima facie*, her promises to pay money are nullities, and to give them effect the facts must be averred which clothe her with the power. As the bill appears, her promise was a nullity.

It may not be necessary, but we will so far modify the decree as to make it a dismissal without prejudice. As amended,

Affirmed.

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Indictment for Arson.

1. *Indictment for arson; sufficiency of.*—An indictment for arson as defined by section 4346 of the Code of 1876, and which substantially pursues the form (No. 34, p. 995 of the Code), charges the offense of arson in the first degree with sufficient certainty.

2. *Same; sufficiency of averment of ownership of building burned.*—The description in the indictment of the property burned, as "the jail of Wilcox county," is a sufficient averment of ownership, the courts judicially knowing that the county jails in this State are the property of the several counties in which they are located, and that each county in the State is a body corporate.

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3. *Confessions; when admissible.*—The confessions of one of the defendants in this case, made to the sheriff and his deputy while in their custody, and not obtained by threats or promises, or in any manner induced by the appliances of hope or fear, held to have been made voluntarily and therefore properly admitted.

APPEAL from Wilcox Circuit Court.

Tried before the Hon JOHN MOORE.

The appellants, Lewis Saunders, John Rentz and Jesse Johnson, defendants in the court below, were convicted at the Fall Term of said court, 1885, of the offense of arson in the first degree. The indictment charged that Saunders and his co-defendants, Rentz and Johnson, with five others who do not join in the present appeal, "wilfully set fire to, or burned in the night time the jail of Wilcox county, which was occupied at the time by persons lodged therein at night, against the peace, &c." A demurrer was interposed to the indictment, it being objected, among other grounds, that it failed "to charge arson in the first degree"; and failed "to allege that the jail charged to have been set fire to or burned, was a prison in which there was at the time a human being." The record does not indicate what disposition was made of the demurrers, and issue was joined upon the plea of not guilty.

From the bill of exceptions, it appears that the main contention in the court below related to the admission of a confession made by one of the defendants, Jesse Johnson, implicating himself and certain of his co-defendants in the perpetration of the offense charged. The deputy sheriff, T. S. Caldwell, testified that he had charge of the jail and that all of the defendants were confined together in the same room or cell; that on the night of the fire, which originated in the cell in which the prisoners were confined (the floor, near the entrance, was burned "an inch and a half to two inches deep," as shown by the testimony of another witness), he went to the room in question to investigate the occurrence; that he required each of the defendants, including the said Jesse Johnson, to undress and leave their clothing in the room and go out naked; that he stood at the door of the room and required them to pass by him one at a time, and as each of the prisoners passed out he "struck him a lick with a strap or small stick which he had in his hand." At the time, the fire was out, but the smoke was still in the room. The witness stated that he required the prisoners to disrobe in order that their clothing might be searched for matches, or other means of kindling a fire, and that the prisoners were kept in one of the dungeons of the jail until the next day. It appears from the evidence that on the following morning the sheriff of the county, W. L. Jones, was informed of the occurrence by his deputy; that they went to the

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jail together and took the said Jesse Johnson, who was still naked, from the dungeon into the enclosure of the jail and questioned him about the fire; that "neither of them made any threat to harm him in any way, nor made him any promise, and neither of them had any stick or weapon;" that Jesse was told: "If you know anything about the burning you must tell us," and he thereupon made his statement. Upon this preliminary proof of the sheriff and his deputy as to the circumstances attending the confession, the court permitted it to go to the jury, and the defendants duly excepted.

Defendants requested the court to give the following charge, which was in writing: "If the jury believe from the evidence that the burning could have been done" by certain designated persons "without the assistance of the defendants, the jury should acquit the defendants." This charge the court refused to give, and the defendants excepted.

The admission of the confession of Jesse Johnson against the objection of defendants, the overruling of the demurrers to the indictment, and the refusal to give the charge requested, are here assigned as error.

JONES & JONES, R. GAILLARD, and HOWARD & BECK, for appellants.

T. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—This indictment was clearly good, and charged with sufficient certainty the crime of arson in the first degree, as defined by section 4346 of the present Code of 1876.—Code, form No. 34, p. 995. The description of the property burned, as "the jail of Wilcox county," was a sufficient averment of ownership, without more. We judicially know that the county jails in this State are the property of the several counties in which they are severally located, and that each county in the State is a body corporate.—Code, 1876, §§ 820, 815. Matters of which judicial notice is taken need not be stated in indictments any more than in ordinary pleadings in civil causes.—*Lockett v. The State*, 63 Ala. 5; Code, 1876, § 4791; *City Council of Montgomery v. Wright*, 72 Ala. 411.

We perceive no error in the admission of the confessions shown to have been made by the defendant Johnson. They were free from every objection, even under the liberal rules laid down by this court, ample proof having first been made that they were not obtained by threats or promises, or in any manner induced by the appliances of hope or fear, excited in the mind of the accused.—*Redd v. State*, 69 Ala. 255; *Murphy v. State*, 63 Ala. 1; *Porter v. State*, 55 Ala. 95.

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The charge requested by the defendants and refused by the court was so obviously bad as scarcely to require notice. It entirely ignores the question of the actual guilt or innocence of the defendants, and directs their acquittal of the crime if the arson charged "could" have been committed without their assistance.

The record is free from error and the judgment is affirmed.

Greene County v. Eubanks.

Action against County to recover Damages for Injuries to Person and Property Caused by Defective Bridge.

1. *Power of Court of County Commissioners over public highways.*—In respect to the public highways, the Court of County commissioners exercises a *quasi* legislative authority; and, in the absence of statutory provisions, the county is not responsible for the manner in which that authority is exercised.

Liability of county for injuries caused by defective bridge.—Under statutory provisions (Code § 1692), where a bridge or causeway has been erected by contract with the Court of County Commissioners the county may protect itself against liability for injuries resulting from a defect in such bridge, by requiring of the contractor a guaranty that it shall continue safe for the passage of the public for a stipulated time; but when no guaranty has been taken, or the stipulated period has expired, the effect and operation of the statute are to devolve on the county the legal duty to keep such bridge in repair while it remains part of an established public highway.

3. *Some; duty of county with respect to necessary repairs.*—The liability of the county having attached by the non-requirement of a guaranty, or by the expiration of the stipulated period, can not be divested by imposing upon the overseer of the public road the duty to keep such bridge in proper repair.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. S. H. SPROTT.

This was an action to recover of appellant county damages for the loss of a mare, and personal injuries to appellee, caused by the defective condition of a bridge, part of a public highway, over which plaintiff was passing when the loss and injuries were sustained.

The complaint contained a single count which averred the erection of the bridge by contract with the County Commissioners of said county of Greene and charged that appellant "failed to take any bond or other guaranty from the person erecting said bridge that the same should continue safe for the passage of travellers and other persons for a stipulated

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time ; or, if such guaranty was taken, the period thereof expired before the injuries occurred :” whereby the said county of Greene became bound to keep said bridge in repair and in a safe condition for the passage of the public. The complaint further avers that the loss and injuries, the foundation of the suit, occurred by reason of the negligence of the defendant in failing to keep the bridge in such proper condition and repair ; that the supports of said bridge had become so weakened and decayed by lapse of time and the want of said proper and necessary repairs, that the structure yielded and broke down under the weight of the mare and appellee, and caused the damages to person and property complained of. The presentation of plaintiff’s claim for damages within the statutory limit of twelve months after the same accrued, to the Court of County Commissioners, and its rejection and disallowance by that body, are duly averred.

A demurrer interposed to the complaint was overruled by the court ; and issue was joined upon the plea of the general issue, and a special plea setting up the contributory negligence of the appellee.

Upon the trial it was shown by transcripts of the orders and proceedings of the Court of County Commissioners, and other evidence adduced by the plaintiff, that the bridge in question was constructed in 1866 by contract with said county of Greene. The evidence also tended to show that a guaranty by bond had been taken from the contractor who erected the bridge ; but the testimony as to this point was uncertain and conflicting. The plaintiff, in his own behalf, testified to the loss of the mare, her value, and the personal injuries sustained by himself.

The appellant endeavored to show that the liability of the county had terminated before the cause of action arose ; but this ground of defence is sufficiently elaborated in the opinion of the court. There was also, as recited in the bill of exceptions, “Evidence tending to show plaintiff was guilty of negligence directly contributing to said injury, and there was evidence tending to show he was not guilty of such contributory negligence.”

The court charged the jury that, if they believed the bridge was built in 1866 and a guaranty taken from the contractor that it should continue safe for the passage of travellers and other persons for a period of five years, and that this period had expired before the alleged injuries to plaintiff and his property ; or, if the bridge was so built, and no guaranty was taken, and the same was repaired in 1874 by contract with the Court of County Commissioners and no bond required, then, in either case, if plaintiff’s injuries to himself and property

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resulted from a defect in said bridge, he was entitled to recover unless his own negligence directly contributed to his said injuries.

To this charge of the court appellant duly excepted, and here assigns the same, together with the overruling of his demurrer, as error.

THOS. W. COLEMAN, and TROY, TOMPKINS & LONDON, for appellant.

CLOPTON, J.—It may be regarded as settled by our decisions, that counties are auxiliary political or governmental agencies. The court of county commissioners exercises a *quasi* legislative authority in respect to the public highways; and the county, independent and exclusive of statutory liability, is not responsible for the manner in which the authority may be exercised.—*Barbour County v. Brinson*, 36 Ala. 362; *Askew v. Hale County*, 54 Ala. 639. The county commissioners may contract for the erection of a bridge, with a guaranty by bond, or otherwise, that it shall continue safe for the passage of travelers, and other persons, for a stipulated time. In such case, any person injured, in person or property, by a defect in such bridge, before the expiration of such period, may sue in his own name, on the bond, or other guaranty, and recover damages for the injury. No liability is imposed on the county for an injury occurring during the stipulated time, when the statutory guaranty has been taken; but if it has not been taken, or the period has expired, a person, sustaining injury because of a defect in the bridge, may sue and recover damages of the county.—Code, § 1692. The effect and operation of the statute are to devolve on the county the legal duty to keep such bridge in a safe condition, either when no guaranty has been taken or after the stipulated time has expired. The liability of the county in such case is not controverted; but it is insisted, that there is evidence tending to show, that the liability had terminated before the occurrence of the injury sued for, which evidence was withdrawn from the consideration of the jury by the charge of the court.

The bridge in question was erected by contract in 1866, the contractor agreeing to keep it in repair during a period of five years. The evidence is conflicting as to a guaranty having been taken. The injury complained of occurred in 1883, being after the expiration of the stipulated period. In 1874, the bridge being very much decayed, and unfit for use, was repaired by contract with the county commissioners, some of the old timbers being used in repairing; and in 1880 and 1883, other small appropriations were made for work done on the bridge.

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The liability of a county for damage, caused by a defect in a bridge erected by contract, commences on a failure to take a guaranty, or if taken, at the expiration of the time; and the lengths of time such liability shall continue is not fixed or limited by the statute. The statute contemplates, that a necessity might arise for erecting bridges by contract, over streams, crossed by a public road, which would be requisite to its convenient and safe use, and which could not be erected by the overseer of the road, with the labor and means furnished him by the statutes. Such bridge constitutes a part of the public highway. A public road, once legally established, continues as such, until discontinued by the court of county commissioners in the manner provided by statute. While no liability is imposed on the county for a failure to keep other parts of the public road in proper condition, when a bridge is erected by contract, as a part of such road, it is the intention and policy of the statute, on account of the increased danger, to afford redress, for injuries caused by defects in such bridge, either against the contractor or the county; and the liability of the county, having once arisen, is co-existent with the reason and policy of such protection. It continues so long as such bridge is connected with, and constitutes a part of an established public road.

When a bridge becomes decayed and unfit for use, the county commissioners may, by contract, erect a new bridge, and by a guaranty, secure the county against liability for a time; or they may undertake to repair the existing decayed bridge. In repairing, they may adopt such mode as may be deemed advisable—by contract or otherwise; but whatever mode be adopted, the county is responsible for the manner in which the duty is performed. Neither the order of the court in 1874, nor any order previously or subsequently made, contemplates or purports to authorize a contract for the erection of another bridge; but only for repairing the one previously erected. Neither can the county be discharged from liability by devolving the duty to repair on the overseer or the road. All the orders and proceedings of the court of county commissioners, respecting the bridge, recognize and treat it as the same bridge, originally erected by contract; and after such orders and proceedings, and such successive repairs, the county will not be permitted to avoid liability, by saying, that in repairing, a new bridge was virtually erected.

There is no error in the rulings or charge of the court.

Affirmed.

Steinhardt v. Bell.

Trover.

1. *Landlord has lien on entire crop grown on rented lands, whether grown by tenant himself or sub-tenant.*—The landlord has a lien on the entire crop grown on the rented lands, for the rent of the current year, whether it be grown by the tenant himself, or by a sub-tenant; and when a bale of cotton is placed by the sub-tenant at the gin-house, and set apart for the landlord in satisfaction of his claim for rent, the title of the landlord is thereby perfected, and he may maintain trover against any one who afterwards converts the cotton.

2. *Ratification not binding unless made with full knowledge of all material facts.*—A subsequent ratification of the unauthorized conversion, by the landlord, if made with full knowledge of all the material facts, is a complete defense to the action; but the burden of proof as to such ratification is on the defendant, and any evidence tending to prove or disprove the landlord's knowledge of any material facts is relevant and competent.

3. *Contradictory statements by witness; when admissible.*—Previous contradictory statements or declarations by a witness, whether under oath or not, are not admissible for the purpose of impeaching him, unless they relate to some matter material to the issue on trial.

4. *Testimony to rebut inference attempted to be drawn in argument; when admissible.*—As a general rule, testimony should not be received merely to rebut an inference attempted to be drawn in argument, unless it be of some pertinent fact overlooked or omitted in submitting the evidence; but, in admitting evidence for this purpose, the court necessarily has a discretionary power in promotion of justice.

5. *Appeal from judgment of justice of the peace; how proved.*—The fact that an appeal was taken from a judgment rendered by a justice of the peace can not be proved by an entry of the word *appeal* on his docket.

APPEAL from the Circuit Court of Dallas.

Tried before Hon. JOHN MOORE.

This was an action of trover, brought by Mrs. Mary Bell, against Adolph and Simon Steinhardt, to recover damages for the conversion of two bales of cotton; and was commenced on March 8th, 1883. Issue was joined on the plea of not guilty; the trial resulting in a verdict and judgment for the plaintiff.

The facts in the case, up to the development of the issue of ratification, the material question raised on the trial in the primary court, are stated in the opinion. The plaintiff, as a witness in her own behalf, testified, in substance, that the attachment proceedings instituted in her name by the Steinhardts against S. B. & John Olds, and which were tried before the justice of the peace, Conoley, were not authorized by her; and

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that she had so testified as a witness on that trial. That neither of the Olds was indebted to her at the time when the attachment suit was tried; that she did not make the affidavit upon which the writ of attachment issued and had not procured the bond to be given therein, and that no counsel had been employed by her to represent her in the trial in the justice court. "I had never been in court before the time I was before Judge Conoley, I was sick and troubled and I remember that I knew nothing about it, and I told them that I had never thought of Steinhardt using attachment. If I said at that time that I ratified it, I did not know what that meant." The plaintiff introduced as a witness John Babcock, who testified, in substance, that he ginned four bales of cotton for Stanton Olds in November, 1880; that when Olds delivered the cotton to the witness "he said two bales was for Mrs. Bell's rent." To this declaration of Olds, accompanying the delivery of the cotton, defendants objected; the court overruled the objection, and defendants duly excepted.

Simon Steinhardt, one of the defendants, testified in substance, that he procured the issuance of the attachment against S. B. & John Olds; that a few days prior thereto he had a conversation with Mrs. Bell, who complained to him that the Olds had not paid their rent, being about \$100.00 in arrear, and asked the assistance of witness in collecting the balance; that the witness suggested that the cotton be attached for the unpaid rent, and agreed to assist her in the matter. The witness further testified that the necessary papers were prepared at his instance by Joseph F. Johnston, a practicing attorney of the Selma Bar, and that he heard the plaintiff, Mrs. Bell, a short while before the attachment suit was tried, request the said Johnston to "act for her" on the trial. As further shown by the bill of exceptions, witness was handed an account headed: "Mrs. Mary Bell, bought of Steinhardt & Bro.," and questioned in reference to it, the court overruling defendants' objection to its introduction. This account, and the purpose of its introduction, are sufficiently noticed in the opinion.

Jos. F. Johnston, a practicing attorney, testified as to his connection with the attachment suit before the justice of the peace, Conoley; his testimony tending to corroborate that of the preceding witness, Steinhardt. He also testified as to the entries upon the docket made by said Conoley (who had since died) showing the rendition of judgment in favor of Mrs. Bell. The only evidence on said docket that an appeal had been taken from this judgment consisted of the word "appeal," which, like the other entries, was in the handwriting of said Conoley. As shown by the bill of exceptions, after the arguments for the defense had been concluded, "the court allowed

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S. W. John, Esq., attorney for plaintiffs, to be sworn and to testify against the objection of the defendants, that the reason he did not have Geo. H. Craig present at the trial as a witness, was because said Craig was absent from town, and told him, witness, that he, Craig, had to go off to Washington and could not remain at the trial when witness had asked him to do so." The court overruled the objection, and defendants duly excepted.

The court, at the written request of the plaintiff, charged the jury as follows: "If the agent of the defendants received the two bales of cotton from plaintiff, under an agreement or promise that the defendants would apply the proceeds of the cotton to the payment of defendants' account against the plaintiff, and this agreement or promise was made for the purpose of deceiving plaintiff, or as a means to get possession of the cotton; or if defendants repudiated said agreement as soon as they were informed of it, then the plaintiff is entitled to recover, unless, after being informed of the conversion, she approved of it and consented that the proceeds of said cotton might be applied to other uses than the one first agreed to." The defendants reserved an exception to the giving of this charge, and excepted to the refusal to give the following requested by them: "If a person make a declaration, using words that have a common and general understanding, and others act on these declarations, such person can not afterwards testify or set up that he or she meant or intended to convey a different meaning." The defendant further requested the court to charge, in substance, that if they believed from the evidence that an appeal was taken from the judgment rendered in the justice court, it devolved on the plaintiff to show that such appeal was prosecuted to effect; and, until this was shown, the judgment stood as rendered and was binding on the plaintiff as to the issues involved in said case. This charge the court refused to give and the defendants duly excepted.

The assignments of error embrace the exceptions noted above, with numerous others not necessary to be stated.

W. R. NELSON, for appellants.

S. W. JOHN, *contra*.

STONE, C. J.—The testimony all agrees in proof of the following state of facts: That Mrs. Mary Bell let her plantation to Stanton Olds, by rent contract, for the year 1880, at the agreed price of three hundred dollars; that Olds sub-let a part of the land to Moore, and that both Olds and Moore cultivated and produced a cotton crop on the lands during that year; that

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before November of the year Olds paid to Mrs. Bell about two hundred dollars of the rent money, leaving about one hundred dollars unpaid; that in the month of November, Olds delivered at a gin, cotton enough, of the crop which had been so grown by Moore on Mrs. Bell's land, to make two bales, and directed that it be turned over to Mrs. Bell in payment of her rent claim; that the cotton was ginned and packed, and set apart as Mrs. Bell's property, and that subsequently the Steinhardts, through their agent, got possession of the two bales of cotton, and applied the proceeds in payment of a debt due from Moore, the sub-tenant, to them. There is no proof tending to show that Mrs. Bell had authorized the Steinhardts to take the cotton and apply the proceeds to Moore's debt. On this state of facts, if there were nothing more, it is very clear that Mrs. Bell made a clear case for recovery, if the uncontradicted testimony was believed. She had a lien on the entire crop grown on the land for the rent, and when the two bales were placed, by the tenant, at the gin-house to be subject to her control, this perfected her title, and enabled her to maintain trover against any one who afterwards converted it. *Robinson v. Lehman, Durr & Co.*, 72 Ala. 401; *Lake v. Gaines*, 75 Ala. 143.

The testimony shows that after the two bales were set apart for Mrs. Bell, at the gin-house, the Steinhardts sought to induce her to surrender them to them as the property of Moore, on which they claimed a lien. This she refused to agree to; but proposed they should take the cotton as her cotton, and allow her a personal credit for it. This they refused to do. After the Steinhardts had taken possession of the cotton, they, through their agent, requested Mrs. Bell to permit them, in her name, to attach other cotton grown on the place that year, and thus collect the remaining hundred dollars of rent. This she refused to do. Notwithstanding this refusal, the Steinhardts did sue out attachment, in her name, against Olds, and had other cotton levied on. A trial of the suit was had, and Mrs. Bell, being summoned as a witness, gave testimony on the trial. Up to this point there is no discrepancy in the testimony.

There is in this case but one main, controverted question of fact between the parties litigant. Did Mrs. Bell acquiesce in and ratify the conversion of the two bales of cotton by the Steinhardts, and agree to look to some other source, or sources, for the payment of her rent? If she did, then this is an answer to the *prima facie* case, which we have shown the testimony, if believed, makes in her favor. On this issue of ratification, *vel non*, the burden of proof was on the Steinhardts. And to make the ratification valid and binding, "the person ratifying must have had knowledge of all essential facts." Wharton on Agency, § 65. Ratification must be "deliberately

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made, with a full knowledge of the material facts, to be binding on the principal.”—1 Brick. Dig. 59, § 98; *Chapman v. Lee*, 47 Ala. 143; *Moore v. Robinson*, 62 Ala. 537; *Herring v. Skaggs*, 73 Ala. 446. It follows that all testimony tending to prove or disprove Mrs. Bell’s knowledge of the facts attending the issue and purpose of the attachment, and tending to prove or disprove her ratification of the use of her name by the Steinhardts in suing out the attachment, was competent evidence.

Olds’ declaration when he delivered the cotton at the gin, that it was for Mrs. Bell in payment of rent, was *res gestæ* to the act of delivery, and was admissible.

What took place in the trial of the case of *Steinhardts v. Mary Bell*, in the City Court, was certainly not evidence tending to prove any part of Mrs. Bell’s claim in this case; and being immaterial, should not have been admitted against the objection of defendants. This applies alike to proof of the oral testimony, and to the account produced in evidence. Neither was it competent, as a means of impeaching the witness Steinhardt, because the testimony given on that trial did not relate to any transaction material to any issue in this suit. Previous contradictory statements, sworn or unsworn, can not be given in evidence as a means of discrediting a witness unless they relate to some matter material to the issue on trial. 2 Brick. Dig. 549, §§ 125, 126; 1 Greenl. Ev. § 462; 1 Whar. Ev. § 551. In admitting this evidence the Circuit Court erred.

Questions raised on the admission of evidence pending the argument will not probably be presented on another trial. What Craig told the witness, was not competent. As a rule, testimony should not be received merely to rebut an inference attempted to be drawn in argument, unless it be of some pertinent fact, overlooked or omitted in submitting the testimony. Discretionary powers may, and frequently should be exercised in promotion of justice.

The charge given by the court, at the request of plaintiff, is free from error. The first charge asked by defendant is obscure, and was rightly refused, because average jurors would not be likely to understand it. It is also abstract, because the record contains no evidence that the Steinhardts took any action, based on anything Mrs. Bell may have stated.

The record fails to show, as fact, that any appeal was taken from Conoley’s judgment. The word “appeal,” written on the docket in Conoley’s hand-writing, is not enough to prove an appeal was taken. The disposition made of the justice’s judgment is not shown in the transcript before us. It ought to be shown.

Reversed and remanded.

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Jolly et als. v. Hobbs et als.*Bill in Equity Contesting the Validity of Mortgage.*

1. *Vested remainder.*—Where property, real and personal, was conveyed by deed to a trustee, in trust that, during the life of Francis N., he should permit her to have the possession, use and enjoyment, “for the comfort and support of her and her two minor children, George and Caroline”; and upon her decease, the said lands, and such of the personal property as then remained unimpaired, “shall belong absolutely and in fee to the said George and Caroline, if they shall both then be in being; and if not, then to the survivor of them, and the heirs of the other, if any, or, if none, then to such survivor, quit and discharged of all uses and limitation.” George having died before his mother, leaving children, *held* that the remainder to Caroline, as to one-half of the property, vested on his death; and on her subsequent death before her mother, that her children could not, on the termination of the life estate, recover against her grantee.

APPEAL from Madison Chancery Court.

Heard before the Hon. N. S. GRAHAM.

This was a bill filed by Benjamin Jolly and others, who were the heirs at law of Caroline Elizabeth Neal and George W. Neal, against Isham H. Hobbs and Frank Neal. The bill alleges that complainants are seized and possessed in fee simple, as tenants in common of a certain lot in the city of Huntsville, Ala., that they derived their title through a deed dated July 9th, 1828, executed by John P. Neal as sheriff of Madison county, Ala., conveying said lot to Preston Yeatman, in trust, as set forth in the opinion of the court. The said George W. Neal, named in said deed as one of the children of said Frances Neal died intestate in the year 1869. Said Frances Neal died in November, 1883. Caroline Elizabeth Neal married Benjamin Jolly, who died. After the death of her husband, viz: on the 22nd day of January, 1874, she executed on April 13th, 1875, mortgages on an undivided half of said lot, of which mortgages Isham H. Hobbs became the holder and owner. Mrs. Jolly died during the lifetime of her mother. Frank Neal, the son of George W., had sold his interest in the lot to one of the complainants.

The bill alleges that said lot could not be equitably divided among complainants, and prayed a sale for partition. Complainants, who are heirs at law of Caroline Elizabeth, charge that she had no vested interest in the lot at the time she executed the mortgages, and pray that they be declared null

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and void, and to remove the cloud upon complainants' title. There was a consent decree that the lots be sold, and the liens of defendant Hobbs, if he had any, should be transferred to the proceeds of sale—and to await the final decree of the court.

The chancellor decreed that Caroline Elizabeth took such a vested interest under the deed of trust to Yeatman as enabled her to execute valid mortgages at the time she executed them, on the half interest conveyed, and that said mortgages were a valid lien therefore, and directed the proceeds of the sale of said interest after deducting costs, to be applied to the payment of said mortgage debt. From this decree complainants, Benj. C. Jolly and others, appeal to this court.

LIONEL W. DAY, for appellants.—1. If Mrs. Neal and her two children shared in the title to this property by the deed, they became tenants in common. This is not the effect of the deed. *Young v. Killebrew*, 36 Ala. 97; *Williams & McConico*, 36 Ala. 29; *McCroan, Trustee v. Pope et al.*, 17 Ala. 612.

2. Neal's deed of conveyance in no wise differs from a recognized executory devise by the terms of which no estate vested in Mrs. Jolly only in a future contingency, which failed. Code 1876, § 2180; 2 Wash. on Real Prop. 341 (marginal page); 1 Fearne on Cont. Rem. 2; *Drews, adm'r, v. Drew*, 66 Ala. 455; *Nixon v. Robbins, ex'r*, 24 Ala. 663. The rule which favors vested legacies will prevail, *unless a clear intention is shown in the will that it shall not vest until the happening of a named contingency*. *Savage v. Benhams, adm'r*, 17 Ala. 119; *High, adm'r, v. Worleys, adm'r*, 32 Ala. 709; *Thrasher v. Ingraham and Wife*, 32 Ala. 646; *Doyle v. Bonler*, 7 Ala. 246; *Sherrod v. Sherrod's adm'r*, 38 Ala. 537; *McRae's adm'r v. Means*, 34 Ala. 349. But an investiture is an immediate, fixed right of future enjoyment not defeasible. 1 Cruse on Real Prop., 343.

3. "If a previous life estate be given, then the period of division is the death of the tenant for life, and survivors at such death will take the whole legacy." This rule applies as well to real as personal property. 3 Jarman on Wills, 585, 588-9; *McVay's adm'r v. Ijams*, 27 Ala. 238; *Powell v. Glenn*, 21 Ala. 458.

CABANISS & WARD, for appellees.—1. The children of Mrs. Jolly must take by descent from her, or not at all. There is no provision in the deed for the heirs of the survivor of the two children, George and Elizabeth. The death of the mother

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determined *when* the absolute fee should go to her descendants, and the death of one of the children, *to whom* it should go.

Every circumstance to favor the construction of a vested interest in Mrs. Jolly concurs: The conveyance is by deed, not by will. The property conveyed is real, not personal. The limitation is to persons named, not to a class. It is to sharers of the prior equitable estate for life, not to mere remaindermen. Courts will struggle *against*, not *for* a construction that defeats the limitation to Mrs. Jolly, and creates a reversion of it to the grantor. 2 Jarman, 440. Mrs. Jolly, at the date of the deed took a vested interest defeasible on a condition subsequent. *Thrasher v. Ingram and wife*, 32 Ala. 645, 667; 2 Inman on Wills, by Randolph and Talcott 443, 444.

CLOPTON, J.—The land in question, and some personalty, were sold by the sheriff under executions on a judgment against Stephen Neal, and purchased by John H. Acklen. By direction of Acklen, the sheriff, in July, 1828, executed a deed, conveying the real and personal property to Preston Yeatman in trust: "That the said Yeatman, and his heirs, etc., during the life of said Frances Neal, shall constantly allow and permit her, the said Frances Neal, to have and enjoy the sole and perfect possession, use, profits, and all and every benefit of, in, to, or from the said personalty and realty, without restraint or hindrance, for the comfort and support of her, the said Frances Neal, and her children, Geo. W. Neal, and Caroline Elizabeth Neal, who are minors. And upon this further trust, that upon the decease of the said Frances Neal, the said lot with its houses and appurtenances, and such of the personal things aforesaid, as may then remain unimpaired or not destroyed in the use thereof aforesaid, shall belong absolutely and in fee to the said Geo. W. Neal and Caroline Elizabeth Neal, if they shall then both be in being, and if not, then to the survivor of them and heirs of the other, if any, or if none, then to such survivor, quit and discharged of all uses and limitations. Frances Neal died in 1883. George died in 1869, leaving children. Caroline married Benjamin Jolly, whom she survived; and after the death of her husband and brother, executed two mortgages on an undivided half interest in the land—one in January, 1874, and the other in April, 1875. She died during the lifetime of her mother, leaving children. The children of George and Caroline are the complainants, and the holder of the mortgages is a defendant.

There is no controversy as to the claim or right of the children of George to one-half of the land. The contestation is, as to the validity of the mortgages executed by Caroline—the direct question being, to what time does the survivorship

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refer? The complainants contend, that the remainder to the survivor is dependent on surviving the life-tenant—that the contingency, on which the prior remainder depends, extends to, and affects the substituted remainder; and the defendant claims, that the remainder vested immediately on the death of George.

In respect to wills, the contention has most usually been, whether the survivorship referred to the time of the death of the testator, or to the period of distribution; as to which the authorities are not uniform. No such question can arise on the construction of a deed, which takes effect immediately upon execution, and, *ex vi termini*, refers to a time subsequent thereto. Analogous cases of wills are those, in which the question has been, whether “The gift was meant to extend to survivors indefinitely (i. e. whenever the contingency should happen), or is restricted to survivorship within a given period after the testator’s decease.”

The general rule is thus stated by a learned author: “Where the original remainder is in terms limited upon the happening of an event (as attaining twenty-one), the non-happening of which occasions the gift over, survivorship is almost unnecessarily referable to that event, whenever it happens.” And conceding, that words are used, which import a restriction of the operation of the gift to survivors, upon an express contingency, to a final distribution of the property, as the same author observes: “The question still remains whether they *need* so survive, or whether it is sufficient that they are living when the contingency happens. The cases will be found to favor the latter position.” 2 Jar. on Wills (Bigelow), 740.

In *Crowder v. Stene*, 3 Russell, 217, the bequest was of stock to executors in trust, to pay the dividends to the wife of the testator during her life, and after her decease to his brother during his life; and after the death of both, his wife and brother, to sell the stock, and divide the money arising therefrom equally between a nephew and four neices previously mentioned in the will; and in case of the nephew, or of any or either of the nieces, dying without lawful issue, before their respective parts became payable, the shares of those so dying shall go to, and be equally divided between the survivor or survivors of them. The wife survived the brother, and at the time of her death only one of the five legatees was alive. Lord Lyndhurst held, that, though the original share of any of them, who died, without lawful issue, during the lifetime of the wife, was divisible among the survivors, such one so dying was entitled to her proportion of the share of one, whom she survived, and who had died without lawful issue, which did not go over like her original share, but passed to her personal representa-

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tive. The doctrine of the decision is, that those who were living at the time the contingency happened, on which the share was to go over, were entitled to a vested and indefeasible interest in the shares, that became subject to the operation of the bequest, without reference to survivorship at the period of distribution.

In *Semfield v. Howes*, 3 Bro. C. C. 90, a sum of money was bequeathed to A. for life, and at her death to her two children; but if either of them should die before their mother, the whole to the survivor. Both died in the mother's lifetime, and Lord Alvanley decided, that the whole sum belonged to the personal representative of the survivor. In *White v. Baker*, 2 D. F. & G. 55, it is said: "Where there is a bequest to A. for life, and after his death to B. and C., or the survivor of them, some meaning must, of course, be attached to the words, 'the survivor.' They may refer to one of three events—to one of the persons named surviving the other, to one of them only surviving the testator, or to one of them only surviving the tenant for life; and in the absence of any indications to the contrary, they are taken to refer to the latter event, as being the more probable one to have been referred to; but where, as in the present case, the bequest is to A. for life, and after his death to B. and C., and in case either dies in the lifetime of A., the whole to the survivor, it is plain that the words in their natural import refer to the one surviving the other, and the question is not to which of the events above mentioned the testator intended to refer, but whether there is any context to alter the ordinary meaning of the words which he has used." Other cases, illustrating the application of the rule, could be cited, but it is unnecessary.

Another general rule is, "When the remainder is, not to several, or the survivor, but to several, and if *any of them die* before the tenant for life, to the survivor, it will be held to mean survivorship *inter sese*, and not at the death of the tenant for life."—2 Jar. on Wills, 741. The remainder in the present deed is to two, and the words, "*if not*," immediately following the gift, over to the children if both be in being at the death of their mother, are equivalent in import to, *if either of them die* before their mother. In such case the survivorship must be understood as meaning survivorship *inter sese*. This construction is confirmed by the remainder being to the survivor, and the heirs of the one first dying, if any. It will not be contended, that the remainder of George's share to his heirs did not vest immediately on his death, the persons to take being *in esse* and ascertained. When the limitation over is to the survivor and the heirs of the one deceased, which latter clearly designates the happening of the contingency as the

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period when the remainder becomes vested, it reasonably follows, that "the survivor of them" is the one who is living, when the contingency happens—that the word is used in its natural meaning, *the longest liver*. This construction is further confirmed by the remainder of the whole to the survivor if the one first dying leaves no heirs—that is—no children or descendants. Whether there were heirs, was ascertainable on the happening of the contingency—the death of one of them; and on the occurrence of the same event, the *quantum* of the estate, whether one-half, or the whole, which went over to the survivor was determinable. This indicates that the survivor was to take at all events, and that the reference was to survivorship indefinitely.

Conceding that the remainder to George and Caroline is contingent on both surviving their mother, it does not necessarily follow, that this contingency extends to, and affects the substituted remainder. Where the prior fee is contingent, a remainder to vest in the event the first should fall in may be created, if it does not succeed, but is a substitute for, or collateral to the contingent fee.—4 Kent, 200. A vested remainder, though preceded by a contingent one, will be good, if the contingency of the event, on which the first depended, does not extend to the subsequent limitation.—2 Wash. Real Prop. 568. The earliest vesting of the remainder is favored by the law, as it prevents its liability to destruction by the immediate tenant; and when in doubt, it will be held to be vested, rather than contingent. The rule applies to substituted remainders, though the prior one be contingent.

The evident purpose in making the deed was, to provide for Frances Neal and her children, and their descendants. This is manifest from the provision, that she was to have the sole and undisturbed possession, use, and profits during her life, for the comfort and support of herself and her children, considered in connection with the subsequent provisions of the deed. After the termination of the life-estate, the fee, contingent on both living at the time of the death of their mother, goes over to the children. It being anticipated that one of them might die, during her life time, to meet such an event, a substituted remainder in the nature of a cross-remainder was created. In gathering, from the whole deed, the general intent of the grantor, or more properly in this case, of the person by whom the deed was directed, a material consideration is, what construction is most beneficial to the donees? As in case of a will, a construction, which causes intestacy as to the residue of the estate, is not favored; so in construing a deed, that construction will be favorably considered, which ultimately appropriates the entire estate to the benefit of the objects of the

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donor's bounty. The deed makes no *express* disposition of one-half of the property in the event the survivor of the children does not survive their mother, if the limitation over to such survivor is not a vested remainder. When a contingent remainder falls in, the estate reverts to the person, in whom the original estate resided. If the limitation over to the survivor is contingent on surviving the mother, no estate vested in Caroline, which her children could take by descent, she having died before the decease of her mother. Her children do not take under the deed; whatever estate they may have is derived from her as her heirs. They take not as purchasers, but by limitation. The construction insisted on by complainant defeats any heritable estate in Caroline, and consequently the title of her children to any relief. They are without standing in court for the purpose of contesting the validity of the mortgages.—*Mc Williams v. Ramsey*, 23 Ala. 813. A construction which works this result should not be adopted, unless compelled by the express terms of the deed. Whether, therefore, the words, "the survivor of them," be taken in their natural sense, or the meaning be gathered from the context, it results, that an indefeasible estate was vested in Caroline on the death of George, which was the subject of alienation.

As the land has been sold, and one-half of the proceeds paid to the heirs of George by a consent decree, the other half being decreed to be paid to the mortgagee, and as the nature of the remainder to the survivor is the sole question argued by counsel, we have rested our decision on the construction of the deed, and have left unconsidered other questions which would have materially affected the right of any of the complainants to relief in the absence of the agreement and consent decrees.

Affirmed.

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Certiorari to Justice of the Peace in Salvage Proceedings.

1. *Statutory proceedings and remedies.*—Statutory provisions which take away, change or diminish the fundamental rights of life, liberty or property, are to be strictly construed; and statutory remedies, for the enforcement of rights unknown to the common law, "are to be followed with strictness, both as to the methods to be pursued, and the cases to which they are applied."

2. *Salvage proceedings in matter of property adrift.*—The statutory proceedings authorizing property adrift to be taken up and secured, and giving a right of salvage to the person who performs such services

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(Code, §§ 2863-76), create a right, and provide a summary remedy for its enforcement; and being in derogation of the common law, everything necessary to confer jurisdiction must affirmatively appear, and nothing will be intended to have been done which is not affirmatively shown to have been done.

3. *Same; appointment of appraisers.*—The property must be first exhibited to the justice, and he must determine whether, in his opinion, it is worth more than thirty dollars; and unless it affirmatively appears by a note or minute by him, which is a *quasi* record, that he determined its value to be more than thirty dollars, an order appointing appraisers is void, and their appraisement does not fasten a statutory charge on the property.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. HENRY C. SPEAKE:

In the matter of certain salvage proceedings had before L. Bowers, a justice of the peace in said county, at the instance of John M. Crowder, who claimed to have taken up the property while adrift in Paint Rock river; on the petition of John F. Fletcher & Co., claiming to be the owners of the property, for a writ of *certiorari* to remove the proceedings into the Circuit Court for revision. The property consisted of a large number of telegraph poles, and saw-logs of walnut, cedar and poplar logs, which escaped from the boom of said Fletcher & Co., during a freshet, on the 7th January, 1882, and floated down the river several miles, to the mill of said Crowder, where they were secured; and he thereupon instituted proceedings before said Bowers, as a justice of the peace, claiming salvage. The entries on the justice's docket, as certified by him to the Circuit Court, do not show at what time the proceeding was commenced; the first entry, dated January 16, 1882, being, "Order of appraisement issued January 16th, 1882; the commissioners come forward, and continued the appraisement until the 24th day of January, 1882." The appraisers appointed were J. R. Woodall, John Butler, and Thos. M. Cobb, whose report, dated February 27th, 1882, stating that they had been "duly sworn to estimate the value of the timber fairly," assessed the value of the property at \$1,727.80, and the expenses of said Crowder, "as per sworn account," at \$620.46. On this report the justice rendered judgment as follows: "July 28th, 1882. Judgment rendered in favor of J. M. Crowder, for sworn account, \$620.46; salvage, \$207.46—\$827.94." Fletcher & Co. appealed from this decision, as shown by another entry, dated November 23d, 1882, "and tendered \$207.40 as the full amount of the costs and compensation to said Crowder; which sum the J. P. refused, and held that Crowder was entitled to \$620.48, in addition to the salvage above set out." The appeal was to two disinterested householders, with leave to them to call in an umpire; and on the subsequent trial before these

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three persons, they awarded Crowder \$650.00 "in full of all charges and demands." The petition for the *certiorari*, verified by affidavit, was filed on the 13th January, 1883. On the hearing, the court quashed the proceedings before the justice. Crowder excepted to this judgment and decision, and he here assigns the same as error.

HUMES, GORDON & SHEFFEY, for appellant.

1. This was an extraordinary remedy, not properly resorted to by appellee; he should have moved to dismiss, before the justice, and upon refusal, could have taken an *appeal*.—*Burns v. Henry*, 67 Ala. 209. An appeal or statutory *certiorari* is expressly given from any judgment rendered by a justice of the peace.—Code, § 3654. The statutes, § 2871 and § 1574, do not take away the right of appeal,—it is a vested constitutional right.—Con. Art. 2, § 26; *Moore v. Randolph*, 52 Ala. 531; *Bell v. Payne*, 2 Stew. 413. Appellee, then had a *specific legal remedy*; therefore, this writ should not have been granted. 2 Brick. Dig. 240 § 4; High on Extraordinary Remedies, §§ 9, 10, 15, 16, 252, 270, 271.

2. The court erred in quashing the proceedings. Defendant can not claim that the proceedings were *coram non judice*, after acknowledging jurisdiction and making a contest.—*Byrd v. McDaniel*, 26 Ala. 585; *Johnson v. Bell*, 71 Ala. 258; 96 Pa. St. 44; 60 Ill. 462.

3. The proceedings were valid. The justice acted as *arbitrator*, not as a justice; the whole proceeding was an *arbitration*, and the question of jurisdiction, as to amount involved, did not arise.

R. E. BROWN, and R. C. BRICKELL, *contra*.

1. At the common law, estrays or goods adrift, not coming within the description of *wrecks*, could not be retained against the demand of the true owner until compensation was paid to the finder or taker-up.—*Nicholson v. Chapman*, 2 H. Blackstone, 254; *Elta v. Edwards*, 4 Watts, 63. The statute is intended to supply the deficiency of the common law, and give a lien to the finder, while, at the same time, protecting the rights of property of the owner.

2. The first duty of the taker-up is to exhibit the property to a justice of the peace within two days after taking up. The property must be *adrift*, and in a condition of peril—3 Watts, 63—whether *adrift*, and whether of more than thirty dollars in value, must be determined by the justice. The appraisers have a duty to perform distinct from that of the justice. Their appraisal fixes the amount of compensation of the taker-up, which the owner is bound to pay before he can claim the restoration of his property.

3. When a new jurisdiction is created by statute, and the court or tribunal exercising it, proceeds in a summary method, or in a course different from the common law, a *certiorari* is the only remedy for a review of its action, unless the statute creating it gives another remedy.—*John v. The State*, 1 Ala. 95; *Ex parte Tarlton*, 2 Ala. 35; *Intendant v. Chandler*, 6 Ala. 899; *Bryant v. Stearns*, 16 Ala. 302. The statute does not prescribe any remedy for revising the action of the justice.

4. In statutory, summary proceedings, the record kept of them must disclose every fact essential to the validity of the sentence or judgment pronounced.—2 Brick. Dig. p. 464, § 1. When a justice of the peace renders judgment in a matter of which he has not jurisdiction, such judgment may be vacated and quashed by writ of *certiorari* at common law, issuing out of the Circuit Court.—*Glaze v. Blake*, 56 Ala. 379; *Dean v. State*, 63 Ala. 153; *Camden v. Block*, 65 Ala. 236.

5. The appearance of appellants before the justice, and their consent to the proceedings, could not give jurisdiction, where it is not given by law.—*Mabry v. Dickens*, 31 Ala. 243; 2 Brick. Dig. 321, § 15; Freeman on Judg. § 120.

STONE, C. J.—In a note to Sedgwick on Statutory and Constitutional Construction, 2d Ed., commencing on page 267, we find the following language, which we consider sound and sensible: “With all the gross imperfection of the common law, it did contain certain grand principles, and these principles had been worked out into many practical rules both of primary right and of procedure, which protected personal rights—rights of property, of life, of liberty, of body and limb—against the encroachment both of government and of private individuals. This was the great glory of the common law. Any statutes which should take away, change, or diminish these rights, should be strictly construed.” This rule of construction is necessary, because such statutes “oppose the overwhelming power of the government to the public power of resistance of the individual, and it is the duty of courts under such circumstances to guard the individual as far as is just and legal.” In the same note it had been previously said, “statutory remedies, especially when the right to be enforced was unknown to the common law, are to be followed with strictness both as to the methods to be pursued, and the cases to which they are applied.” 2 Brick. Dig. 464, §§ 1, 2. Such remedies must be sustained by the allegations and recitals of the record, and can not be aided by intendment.” *Id.*

The present controversy grew out of a claim for salvage, expenses and costs, under Chapter 3, Title 7, Part 2 of the Code of 1876, commencing with § 2863 of that Code. The claim

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rests entirely on statutory provision; for, without it, the claimant would have no standing whatever in court. *Nicholson v. Chapman*, N. H. Blackstone 254; *Etter v. Edwards*, 4 Watts 63. The proceedings are summary, and, in their main features, *ex parte*. The statute contemplates a deliverance from peril of another's goods found adrift, and compensation, called salvage, for the labor and care bestowed, in effecting the rescue. Certain steps are required to be taken by the captor: He must, within a given time after the same is taken up, "exhibit the property to a justice." This is the first step, and one object attained by it, is the rendering more difficult a fraudulent or collusive taking up of another's property. Justices are officers of the law, are commissioned and sworn, and the presumption is, they will hold the scales of justice without prejudice or partiality. Inspecting the property, if its value does not exceed thirty dollars, the justice must himself make the appraisement and description. If, in his opinion, it is worth more than thirty dollars, he must issue an order of appraisement to three disinterested freeholders, or householders, who, after being duly sworn to estimate the value of such property fairly, must appraise and certify the same to the justice of the peace, with a description of the property. § 2864. All these steps, the statute contemplates, are *ex parte*, and take place when no one is present to represent the owner of property. And being taken, the taker up has a right to retain the property in his possession, until the owner proves his ownership to the satisfaction of the justice, and obtains from him an order to restore such property on the payment of the legal costs and charges thereon. § 2869. The rate of compensation to the captor is *per centum* on the appraised value of the property, graduated by the amount from 25 *per cent.* of the value down to 5 *per cent.* § 2870. The captor is also entitled to the justice's fees paid by him, the expenses of the advertisement, if published in a newspaper, and reasonable compensation for the keeping, if necessary to preserve the property from loss or injury, and to two dollars each to the appraisers, other than the justice. §§ 2871, 2872. The result of these proceedings, if properly conformed to, is to fasten a charge by no means light, on the owner and his property, in the determination of which he has not been heard, and generally without his knowledge.

The transcript before us contains a copy of all the proceedings, or *quasi* records, which the justice and the appraisers reduced to writing. It contains all the papers pertaining to the proceeding, except a notice served on the justice by the claimants of the timber, offering to pay a sum admitted to be due, and demanding from him that he issue an order on the taker up, to restore the property to the owner, in accord-

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ance with the provisions of § 2869 of the Code. This notice and demand can neither validate nor invalidate the prior proceedings.

The present being a statutory and summary proceeding, in palpable derogation of the rights and remedies provided by the common law, the rule must be applied that everything necessary to confer jurisdiction must be expressed, and nothing will be intended to have been done, which is not affirmatively shown to have been done. Nor is vague and doubtful implication enough. Certainty—reasonable certainty as fact—must appear.

The first essential fact was and is that the property alleged to have been captured when adrift, was exhibited to the justice. That is—the property must be carried to the justice, or the justice must visit the property. The second essential fact is, that the justice must determine whether in his opinion the property is worth more than thirty dollars. These being indispensable precedent facts, before any authority is acquired to issue an order for appraisement, they are too vital to rest in mere memory or implication. A note or minute—a *quasi* record—should be made of them. They are the necessary conditions which justify the order to the appraisers, and the written order to the appraisers shows who are the persons selected for the service, and this, too, is part of the *quasi* record, which goes to make up and legalize this statutory, and highly summary proceeding. The present proceeding was and is wanting in each of these essentials, and it follows that no legal authority was acquired to appraise the property, or to fasten a charge upon it in favor of the captor.

The statute we have been construing makes no provision for an appeal, or for reviewing action had under its provisions. *Certiorari* is the proper remedy. 1 Brick. Dig. 332–3, §§ 1, 2, 4; *Molett v. Keenan*, 22 Ala. 484; *Benton v. Taylor*, 46 Ala. 388; *Ex Parte Buckley*, 53 Ala. 42; *Glaze v. Blake*, 56 Ala. 379; *City Council v. Belser*, 53 Ala. 379; *Ex parte Madison Turnpike Co.*, 62 Ala. 93; 2 Wait Ac. & Def. 134, §§ 1, 3, 5, 8.

It is contended for appellant that after the appraisement had been made, the owners of the property came in, and appealed to an arbitration, and there litigated the questions—thus, as it is claimed, legalizing the proceedings, if otherwise irregular. We can not assent to this. The proceedings being purely statutory, and a radical departure from common law methods, no after conduct can validate the proceeding, which, as we have shown, is wanting in the first elements of regularity. Neither the justice nor the appraisers had any general jurisdiction of the subject, and we have shown above that jurisdiction was

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never acquired under the statute. What we decide is, that under the proceedings shown in this transcript, there is no judicial determination, nor *quasi* judicial determination, nor legal ascertainment, as matter of law and fact, that Crowder, the captor, is entitled to hold the timber, until the claims asserted are paid. If he acquired any rights under the arbitration—as to which we decide nothing—they can not be maintained in this proceeding. It would seem, however, that no such acquired rights, if they exist, could operate a lien on the timber. *Nicholson v. Chapman, supra.*

As we understand the statute we are construing; the percentage allowed the captor under § 2870 of the Code, is all he can claim for rescuing the property, and placing it in a place of safety. If after this he reasonably and rightfully incurs expense in keeping and preserving the property from loss or injury, he is entitled to compensation, “to be ascertained as in case of estrays.” § 2871. This has no reference, however, to labor or expense in rescuing the property from peril in the first instance. The percentage covers that, and was in no sense intended as a *sine cure* bounty to the taker up.

Affirmed.

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Bill in Equity for Alimony.

1. *Alimony; jurisdiction of courts of equity in granting.*—Courts of equity have jurisdiction to grant alimony to a married woman, in the nature of maintenance, not merely as incidental to a bill for divorce, but on the original and independent ground that legal remedies are inadequate to enforce the duty of maintenance on the part of the husband.

2. *Same; bill for; when fraudulent grantees of husband may be joined as defendants.*—Fraudulent grantees, to whom the husband has transferred his property in fraud of the complainant's right of maintenance, may be joined with him as defendants to such a bill; and the bill is not multifarious because they claim under several conveyances executed with the same common intent.

APPEAL from the Chancery Court of Calhoun.

Heard before Hon. N. S. GRAHAM.

The original bill in this case was exhibited, on 6th January, 1885, by Adaline A. Hinds, by next friend, against her husband, Daniel Hinds, charging his desertion and abandonment of complainant without making any provision for her maintenance, and praying that reasonable alimony be decreed her out

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of his estate. The bill was subsequently amended so as to make parties defendant thereto, Mrs. W. F. Hanna and Mrs. Ephraim Allen, children of respondent, to whom he had, as alleged, fraudulently transferred substantially all his property, "in deliberate anticipation of oratrix's bill of complaint." The defendant, Hinds, demurred to the bill upon the grounds, *inter alia*, that there was "no bill pending for divorce *a vinculo matrimonii*;" that the bill would not lie "for alimony alone;" and that there was a misjoinder of parties defendant.

The decree of the chancellor overruling the demurrers is here assigned as error.

E. H. HANNA, for appellants.

G. C. ELLIS, *contra*.

SOMERVILLE, J.—The first question raised by the demurrer to the complainant's bill is, whether courts of equity in this State possess jurisdiction to grant alimony, in the nature of maintenance, to a wife, unconnected with any proceedings for divorce. The bill alleges that the defendant abandoned the complainant, without any just excuse, and refused to live with her, or to make any provision for her support and maintenance. The prayer is for alimony, without seeking a divorce.

This question was fully discussed by this court in the case of *Glover v. Glover*, 16 Ala. 440, where, after an elaborate review of the authorities, the conclusion was reached that courts of equity exercised a jurisdiction over the subject of alimony, not merely incidental, but original, in cases where the wife's right to a maintenance exists. The broad ground upon which the jurisdiction is made to rest is the unquestionable duty of the husband to support the wife, and the inadequacy of legal remedies to enforce this duty. The doctrine of this case was followed in *Mims v. Mims*, 33 Ala. 98, and again in *Wray v. Wray*, *Id.* 187.

It may be admitted that the weight of authority, both in England and in this country, is opposed to the doctrine adopted in these cases, but the reasoning upon which this doctrine rests is logical and sound, and is supported by many well considered decisions of our most respectable courts. Among these may be mentioned the courts of Mississippi, Iowa, Kentucky, California, South Carolina and Virginia.—*Garland v. Garland*, 50 Miss. 694; *Graves v. Graves*, 36 Iowa, 310; *Logan v. Logan*, 2 B. Monroe, 142; *Galland v. Galland*, 38 Cal. 265; *Prather v. Prather*, 4 Desau's Eq. 33; *Rhame v. Rhame*, 1 McCord Ch. 197; *Purcell v. Purcell*, 4 Hen. & Munf. 507; *Almond v. Almond*, 4 Rand. 662.

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Mr. Justice Story, in commenting on the rule settled in these cases, observes, that "there is so much good sense and reason in this doctrine, that it might be wished it were generally adopted."—2 Story's Eq. Jur. § 1423*a*. See, also, Schouler on Husband and Wife, § 485; 2 Cord. on Leg. & Eq. Rights Mar. Women (2d Ed.), § 958 *et seq.* Some of the States have accordingly seen fit to adopt it by statutory enactment, thus affirming confidence in its wisdom and sound policy. Without being unmindful of the force of the criticisms pronounced upon these cases by recent law writers, we are not willing to depart from, or overturn the principle established by them, at this late day.—3 Pom. Eq. Jur. §§ 1120, 1299.

The wife's claim to alimony is an equitable demand against the husband, and there can be no doubt of her right to attack for fraud any transfers or alienations of property made by him with intent to defeat her claim, and that such fraudulent grantees may properly be made defendants to the suit for alimony. Wait on Fraud. Conveyances, p. 140, § 90; *Turner v. Turner*, 44 Ala. 437.

The bill was not rendered multifarious by reason of the joinder of the several grantees as co-defendants in the suit. They are all grantees, or donees, of the same person. The several transfers spring out of the alleged common purpose to defraud the complainant, and the object and purpose of the suit is single in seeking satisfaction of the complainant's demand out of the debtor's property which is alleged to have been fraudulently conveyed.—*Russell v. Garrett*, 75 Ala. 350; *Lehman v. Meyer*, 67 Ala. 396; *Halstead v. Shepard*, 23 Ala. 558; *Fellows v. Fellows*, 15 Amer. Dec. 428-9.

The demurrer to the bill was properly overruled and the decree of the chancellor overruling it is affirmed.

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Bill in Equity by Executor praying Construction of Will.

1. *Personal trust under will; when executor invested with.*—Where the testatrix appointed her husband as the executor of her will, giving him a life-estate in all the property, with remainder to their children, giving also to him a discretionary power to sell and re-invest, and relieving him from giving bond; *held*, that a personal trust was created, which did not attach to the executorial office, but was limited to the donee of the power.

2. *Same; construction of will.*—The husband having executed a deed conveying to the remainder-men, in consideration of love and

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affection, his life-estate in the property, but expressly reserving to himself the power to sell and re-invest as conferred by the will, with power to collect and disburse the rents without liability to account; whatever may be the effect of the provision as to the rents, the power of sale or disposition is unaffected by the conveyance.

3. *Infant defendants to the bill; measures for protection of.*—The husband having filed a bill in equity, asking the instructions of the court as to the validity and extent of his powers, and making the children defendants, the infants thereby become wards of the court, whose duty it is to protect their interests; and the complainant should be required to report to the court, for confirmation, any sale made by him, and may be required, if necessary, to give bond for a faithful re-investment of the proceeds of sale.

APPEAL from the City Court of Birmingham.

Heard before Hon. H. A. SHARPE.

The bill in this cause was filed on the equity side of said court by Christian Scharpff, the husband of Mary Scharpff, deceased, and the executor of her last will and testament. By said will the testatrix devised all her property, both real and personal, to her husband "to be owned and controlled by him during his life" and allowing him "free latitude to use and manage the same according to his judgment during his life; and at his death my estate, and all property, either directly or indirectly the proceeds of it, to become and be the property equally of the children of myself and said Scharpff by our marriage." The bill was filed for the purpose indicated in the opinion, the children of the complainant and his testatrix (who were all minors with the exception of M. H. Proctor) being made defendants. The remaining facts are sufficiently stated in the opinion.

JAMES J. GARRETT, for appellants.

R. H. STERRETT, *contra*.

CLOPTON, J.—There can be no question, that the will of Mrs. Scharpff invests the complainant, who was her husband, with ample power to sell or dispose of her real estate. A large and extraordinary power is conferred, the exercise of which may promote, or ruinously affect the rights and interests of the remaindermen. The will exempts the executor from giving bond as such. The wife reposed unlimited confidence in the integrity and prudence of her husband, and relied on his parental affection to protect the interests of their children. The exercise of the power is discretionary, and requires judgment in the matter of re-investment as well as of sale or other disposition. It is a personal trust, limited to the donee of the power, and does not attach to the executorial office. *Perkins*

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v. Lewis, 41 Ala. 644; *Tarver v. Haines*, 55 Ala. 503; *Mitchell v. Spence*, 62 Ala. 450.

The will devises to the donee of the power a life-estate in the realty with remainder to the children of the testatrix. On November 11, 1884, after the probate of the will, the complainant executed a deed, conveying, in consideration of love and affection, all his right, title, and interest in and to the real and personal property to the remaindermen, being his life estate. The deed reserves all the rights privileges and powers as to the sale or exchange or re-investment of the property, given to complainant by the will, and the further right to rent the property, collect the rents and disburse them, as he may see proper, without liability to account to any one for the manner in which they are disbursed or paid out. Where a person, seized in fee, conveys the premises by deed to another, reserving their use, occupation, and enjoyment, exempt from payment of rent, or other charge for the possession and use, during the life of the grantor, the legal effect is to reserve a life-estate in the grantor with a vested remainder in fee in the grantee. *Planter's Bank v. Davis*, 31 Ala. 626. If, in such case, the reservation of the use and occupation is without limitation, it is inconsistent with and repugnant to the estate created by the conveyance, and therefore void. *Scott v. Baker*, 13 Ala. 182.

For the purposes of this case, it is unnecessary for us to consider and decide, whether the reservation in the conveyance of the right to receive and disburse the rents is in trust and for the use of the children, with unlimited discretion as to the manner of disbursement for their benefit, without liability to account therefor; or whether the reservation is for the use and benefit of complainant, and therefore repugnant to the estate conveyed. In either view, it may be that such conveyance would operate a destruction of a power of sale or other disposition, if such power was not expressly, or by clear implication reserved. The conveyance expressly reserves all the rights, privileges, and powers as to the sale, or exchange of the property, and re-investment, given to the grantor by the will of Mrs. Scharpff. The force and effect of the reservation are the same, and if the powers conferred by the will were recited *in totidem verbis* in the deed. The complainant's powers of sale or other disposition, remain unimpaired and unaffected by the conveyance.

The complainant, as trustee, invokes the construction and direction of the court as to the validity and extent of his power. All the remaindermen are infants and are made parties to the bill. By the institution of such suit, the infants become wards of the court, and the court has the power to ex-

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ercise over them and their estate a general superintendence and control. In the answer of the only adult defendant, it is stated, that the real and personal property, devised by the will, is the only dependence of the children for a support; and by the answer of the guardian *ad litem*, the infants "commend themselves and their rights" to the protection of the court, and ask that no decree be made to their prejudice. No sale of the property can be made, in pursuance of the power, for any purpose, other than of reinvestment—the property acquired either by exchange or purchase to be treated under the provisions of the will, as a part of the original estate of the testatrix. If there should be a well founded apprehension of the loss or waste of the proceeds of sale, the children would have the right to apply to the court to require of the trustee a bond to secure the proper re-investment of such proceeds. In such case, and under such circumstances, the court having acquired jurisdiction, should take the rights and interests of the infants under its supervision. *Lee v. Lee*, 55 Ala. 590; *Dunham v. Millhouse*, 70 Ala. 596. The trustee should have been required, by the decree, to report to the court for its confirmation any sale or exchange of the real property made by him, and also the re-investment of the proceeds of sale, to the end, that the court may ascertain that the interests of the infants are fully protected.

The decree will be amended in this respect, and as amended, affirmed.

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Trover.

1. *Written contract under which rights of parties to be determined; refusal to require production of when the record shows plaintiff had it in court a reversible error.*—As held in this case on the former appeal (67 Ala. 504), the plaintiff should be required to produce the written contract with Robbs Brothers under which the timber was felled, and by which the relative rights of the parties are to be determined; and the refusal to require the production of this paper, when the record shows that the plaintiff had it in court, is a reversible error.

2. *Felling and conversion of timber by trespasser upon land; when owner may maintain trover or detinue.*—When a trespasser enters upon land, fells timber, and converts it to his own use, the owner may maintain trover for the conversion, or detinue for the property, if it can be identified, notwithstanding any change in its form; but this principle does not apply to timber cut by an adverse possessor.

3. *Trover; legal title or present right to possession necessary to main-*
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tain.—To maintain trover, the plaintiff must have a right to the property itself, not a mere lien on it; a legal title, or present right to possession.

APPEAL from the Circuit Court of Talladega.

Tried before Hon. L. F. Box.

The facts sufficiently appear from the opinion taken in connection with the previous report of the case in 67 Ala. (*Street v. Nelson*, p. 504).

BOWDEN & KNOX, for appellants.

STONE, C. J.—This case has been once before in this court. *Street v. Nelson*, 67 Ala. 504. In that trial, as in this, the circuit court had refused to require Nelson & Kelly to produce the written contract with Robbs Bros., under which the timber had been felled, and converted into coal. We reversed the judgment of the Circuit Court on account of that ruling. We said: "That [contract] defines and determines the relative rights of the parties as between themselves, and was a main issue, if not the main issue in the cause. The Circuit Court erred in not requiring the production of that contract in evidence, as the best exponent of its terms, and of the relative rights of the parties to this suit." The present record, after stating that Kelly, the witness, admitted on the stand that he had the contract in court, shows that the court refused to require him to produce it; and thus the precise question then ruled on is again before us in the same case. This imposes on us the duty of again reversing the judgment of the Circuit Court.

There is a rule of law, that if a trespasser enter upon the land of another, and fell his timber, and afterwards detain, or convert it to his own use, detinue or trover may be maintained for the detention, or conversion. And the conversion of the timber into something much more valuable does not impair the plaintiff's right of recovery, so long as it can be individualized and identified. "Whatever alteration of form any property has undergone, the owner may seize it in its new shape, if he can prove the identity of the original materials; as if leather be made into shoes, or cloth into a coat, or a tree be squared into timber." *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 Johns. 168; *Brown v. Sax*, 7 Cow. 59; *Wright v. Guier*, 9 Watts, 172; *Riley v. Boston Water Power Co.*, 11 Cush. 11; *Note to Armory v. Delamivir*, 1 Smith's Lead. Ca. 8th Ed. part 2, 707; *Cooper v. Watson*, 73 Ala. 252; *Riddle v. Driver*, 12 Ala. 590.

There is an exception to this rule, when the person who com-

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mits the trespass and converts the timber is in the adverse possession of the land. Title and right of possession of lands can not be determined in a mere suit for the conversion of timber. *Beatty v. Brown*, 76 Ala. 267; 1 Smith Lead Ca. 8th Ed. part 2, 704.

The present case is not influenced by the principles stated above. The proof of Kelly himself shows that Robbs Bros. entered upon the land, not as trespassers, but under a written contract with Nelson & Kelly, or Kelly & Co., the alleged owners of the land, to cut the timber and convert it into coal. There was then no conversion up to this point. If there was a conversion, it was in the sale to Street. Nelson & Kelly's right to maintain the action of trover depends on the nature and title of the claim they had to the coal and timber, and that depends on the written contract between them and Robbs Bros., and the extent the contracting parties had performed its stipulations. In other words, according to the tendency of the testimony in this record, it depends, not on the ownership of the land, as it would probably be if Robbs Bros. had cut the timber and converted it into coal, as mere trespassers; but the real inquiry is, whether by a compliance with the executory provisions of the contract, or in some other way, a right had accrued to the plaintiff, in their joint name, to demand and recover the coal and timber, or the value of them. To maintain such action, they must have had a right to the thing, and not a mere lien: A joint legal title, or joint, present right of possession. 1 Smith Lead. Ca. part 2, 8th Ed. 704; 2 Brick. Dig. 484, §§ 3, 4.

Under the principles declared above it is not necessary that we pronounce on the various exceptions to the charges given and refused. It is manifest that the testimony on another trial will be materially variant from that found in this record, and the instructions will probably be varied accordingly. The Circuit Court did not err in refusing to receive evidence of Street's reply, when the property was demanded of him by Kelly.

Reversed and remanded.

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Bill in Equity to Establish Resulting Trust.

1. *Resulting trust; what evidence necessary to establish.*—The evidence in this case, seeking to establish a resulting trust in lands by parol evi-

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dence, does not come up to the requirements of the rule—the testimony must not only be entirely satisfactory, but clear and undoubted.

2. *Conveyance of lands executed by husband and wife jointly and attested by two witnesses ; when sufficient to convey wife's interest.*—A conveyance of land executed by husband and wife jointly, and attested by two witnesses, is sufficient to convey whatever interest the wife has, unless the consideration was the payment of the husband's debt ; and the payment of part of the consideration in cash, and the balance in extinguishment of a prior vendor's lien, is sufficient to uphold it as a sale.

3. *Several complainants ; effect of failure of one to recover.*—If one of several complainants shows no right to recover, the others can not recover ; and if the one so failing was the original complainant, the others having been brought in by amended bill, the defect can not be cured by amendment.

APPEAL from Jefferson Chancery Court.

Heard before Hon. THOMAS COBBS.

The bill in this case was exhibited on 1st July 1882, by Mrs. Elizabeth C. Reynolds as sole complainant, her children being subsequently made co-complainants, by amendment, against H. M. Caldwell and her husband, William M. Reynolds, and alleged, in substance: That on a date not specified, the respondent, Reynolds, and George E. Camp, leased from the Elyton Land Company, a domestic corporation, certain designated lots in the city of Birmingham ; that while occupying said lots they made permanent improvements thereon by fencing the same and erecting thereon a house, intended for use as a hotel ; that before the expiration of the lease, the respondent, Reynolds, became desirous of purchasing the property, and also an adjoining lot, and made an agreement with the Elyton Land Company to that effect, having first procured from his co-tenant, Camp, a written relinquishment of his interest in said lease ; that upon executing his notes for one thousand dollars to the said Elyton Land Company he received from the Company its bond for title. He paid \$100 of the amount, but became unable to make further payments. The bill further avers that on the 9th August, 1877, the said Reynolds, for the purpose of paying his debt to the said Elyton Land Company, on account of the balance due as purchase-money for said lands, made a deed to H. M. Caldwell, in which the complainant, Elizabeth C. Reynolds, joined, conveying said lands to said Caldwell (except 10 feet off of the west side of lot No. 115), together with all the improvements thereon, consisting of the fencing and the house, intended for use as a hotel, aforesaid, for the sum of \$200, paid said Reynolds by said Caldwell, and \$900, to be paid by Caldwell to the Elyton Land Company, to extinguish the debt due to said Company, by Reynolds, on account of the purchase-money of said lands. Caldwell paid said debt of Reynolds to the Elyton Land Company, and the Company executed to Caldwell a deed of conveyance to the lands in ques-

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tion. The bill avers that the improvements on said lands were erected with moneys belonging to the equitable and statutory separate estates of the complainant, Elizabeth C. Reynolds; that of the amount expended in the erection of said improvements, viz: \$2,300, the sum of \$1,200 thereof constituted a part of the complainant's statutory estate, and the remainder of the sum consisted of funds belonging to the equitable estate held in trust for her by the said William M. Reynolds, under a deed of trust executed to him, as complainant's trustee, by her father, Hiram Camp, a copy of which deed is made an exhibit to the bill. The bill further alleges that the respondent, Reynolds, "had no authority to transfer and sell the said lands to the respondent, Caldwell, to pay the debt of the said William M. Reynolds to the said Elyton Land Company, and that said sale of said lands, and the improvements thereon, was a breach of the trust created by the said deed in trust, from Hiram Camp to the said William M. Reynolds," and that said Reynolds "had no authority to sell said lands to said Caldwell, as aforesaid, for the additional reason that twelve hundred dollars of the separate statutory estate of the complainant had been invested in said land as aforesaid, and as before alleged in this bill of complaint; the said sale to said Caldwell having been for the purpose of paying the debt of said William M. Reynolds to the said Elyton Land Company." The bill charges that the said George E. Camp, Reynolds, Caldwell and the Elyton Land Company, each, had notice of the fact that complainant's funds, constituting her separate statutory and equitable estates, were employed in the erection of the said improvements; and concludes with an appropriate offer to do equity in the premises, and a prayer that the deed from Reynolds and the complainant to Caldwell be cancelled, and that the title to said lands be divested out of said Caldwell and invested in complainant, &c.

The view of the cause taken by this court renders it unnecessary to notice, in detail, the answer and demurrer of respondent Caldwell to complainant's original and amended bill. On final hearing, on pleadings and proof, the chancellor was of opinion that the complainant was not entitled to relief and caused a decree to be entered dismissing the bill. This decree is here assigned as error.

SMITH & LOWE, for appellant.

JOHN T. TERRY, *contra*.

SOMERVILLE, J.—There are several grounds upon which, in our judgment, the decree of the chancellor must be affirmed.

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Of these we need specify but two. In the first place, we are unable to see clearly that the chancellor has erred in finding that the testimony adduced in the cause is insufficient to establish the trust in favor of complainants, without which the bill is entirely devoid of equity. The rule is that a trust of this nature, sought to be engrafted upon lands by parol evidence, and such as results by operation of law, must be supported by testimony not only entirely satisfactory, but clear and undoubted. The proof in the cause, in our opinion, does not come fully up to this rule, and so the chancellor found, as shown by his opinion and decree.

Conceding, however, that the complainants had an equitable interest in the lands in controversy, arising from the investment of their funds in the improvements erected on the leasehold estate owned in the premises by William M. Reynolds, the husband of Mrs. Elizabeth C. Reynolds, the deed of August 9th, 1877, executed by Reynolds and wife to the appellee, Caldwell, operated to release to the grantee in the deed whatever interest Mrs. Reynolds had in the property.

If the husband alone had signed the conveyance, there might be some force in the argument, that, in as much as it was a mere quit-claim deed, the grantee would be put on inquiry and charged with notice of the wife's equity in the premises. But the conveyance was executed in such form as to convey a title to the property even had it belonged exclusively to the wife, provided it be construed to be a *bona fide* sale of the property for money, or its equivalent, and not in payment of the husband's debt. It was a conveyance by instrument in writing, signed jointly by husband and wife, and attested by two witnesses as to the signature of each.—Code, 1876, §§ 2707, 2161.

That there was a sale of the interest of the wife for cash there can be no doubt. It is a misapprehension of the facts to say that the land was sold to pay an ordinary debt of the husband, such as to constitute a misappropriation of the wife's statutory separate estate, within the inhibition of the statute which has been construed to forbid a sale of the wife's property held under the statute, to pay the husband's debts. The price agreed to be paid by Caldwell for the interest of Reynolds and wife in the lands was nominally twelve hundred dollars. It was really and in truth only *two hundred dollars in cash*, which is shown to have been paid, and for further consideration, the satisfaction of the purchase-money due the Elyton Land Company, as the original vendor, which still held the legal title, having executed to Reynolds only a bond for title. This lien was superior to any equity or claim of the wife, and the land was liable for it as an existing encumbrance, of which all the world is bound to take notice. The payment of this

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encumbrance, or rather the sale subject to it, was not a payment of Reynold's debt from the wife's property, in any just or proper sense.

There is no suggestion made, or proof adduced, of the fact that the sum of two hundred dollars was an inadequate price for the property, subject to this encumbrance. No question is, therefore, raised touching this feature of the case.

It follows from these principles that Mrs. Reynolds, one of the complainants, having parted with her equity in the land, was not entitled to recover. As to her, the bill lacked equity. She not being entitled to a recovery, her co-complainants were likewise precluded.

The bill is not susceptible of amendment so as to correct this variance, because to strike out her name would result in an entire change of parties, the children having been made co-complainants, by amendment, after the commencement of the suit.

Affirmed.

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Action on Promissory Notes.

1. *Application of payments; rule as to.*—When a debtor owes two or more separate debts to the same creditor, and makes a general payment, not specifying the particular debt to which it shall be applied, the creditor may apply it at his own election; but, if the payment is made with the proceeds or sale of mortgaged property, it must be applied to the extinguishment, *pro tanto*, of the mortgage debt, unless the debtor consents to a different application.

2. *Same; recital in mortgage as indicating acquiescence in application of payments previously made.*—In an action on two notes, each secured by a separate mortgage, a question being as to the application of partial payments arising from the proceeds of sale of the mortgaged property—whether on the notes thereby secured, or on an unsecured debt—a recital in the second mortgage as to the balance remaining unpaid on the note secured by the first, is competent evidence for the plaintiff, as showing an admission by the defendant that the previous payments had been properly applied.

3. *Action on note containing waiver of exemption.*—When a waiver of exemptions is claimed, in an action on a note, it must be alleged in the complaint, and may be specially controverted; and, when controverted, the special issue must be found in favor of the plaintiff, or the waiver can not be incorporated in the judgment.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. S. H. SPROTT.

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The facts are sufficiently stated in the opinion, with the addition of the charges therein referred to. That requested by the defendant, to the giving of which the plaintiff reserved an exception, was in the following language: "If the mortgages contain a lien on the crop and stock advanced, or stock bought with the money so advanced, and if the jury believe, from the evidence, that two mules were so advanced, and if the jury believe that the cotton raised, and the mules were turned over to plaintiff, the law applies the value of the cotton and the mules to the payment of the mortgage debt, and if the notes sued upon are secured by the mortgage, the value of the cotton and mules must be applied to the payment of the notes, unless the plaintiffs have satisfied the jury that the defendant, with a knowledge of the fact, consented and agreed that the cotton and the mules, or the mules, should be applied to the account, and not to the notes in the mortgage." The plaintiff excepted to the refusal of the court to charge as follows: "If the jury find, from the evidence, that the mule bought and charged in 1879, \$112.50, and the mule bought and charged in 1880, \$115.00, were returned by defendants and credited on account of 1880 for \$167.50, and only the hire of said mules for 1879 and 1880 is claimed on the notes sued on, then the jury, in applying the credit of \$167.50, will not credit the same again to either note sued on."

WM. P. WEBB, for appellants.

T. W. COLEMAN, and TROY, TOMPKINS & LONDON, *contra*.

CLOPTON, J.—The action is founded on three notes; two bearing date March 24, 1879, and the other January 23, 1880. They were secured by mortgages on real and personal property, executed contemporaneously with the notes. Payments were made in each year with a part of the property covered by the mortgages, or its proceeds. The plaintiffs made advances to the defendants during each of the years, exceeding the amount of the notes. The defendants contended that such payments should be applied to the notes secured by the respective mortgages. The plaintiffs insisted that the payments were applied to the unsecured portion of the indebtedness by the consent of the defendants. This was the main contention between the parties, as to which the evidence was conflicting. The plaintiffs offered in evidence the mortgage of January 23, 1880, the mortgage of 1879 having been previously introduced. The court admitted the mortgage, so far as it related to the note of that year, but excluded it, and instructed the jury that they were not to consider it as an admission by the defendants of

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an indebtedness on the notes, secured by the mortgage of 1879, or of a correct application of the previous payments.

The general rule is, that while a creditor has the right to apply a general payment, the debtor having made no specific application, the law, in the absence of an agreement to the contrary, applies a payment realized from a particular fund in relief of such fund. On this principle a mortgagee, in the absence of an agreement with the mortgagor, is bound to apply moneys realized from the sales of property covered by the mortgage to the mortgage debt; but as between mortgagor and mortgagee, such moneys may, by the consent of the mortgagor, be applied to the payment of an unsecured debt. The consent of the defendants was, therefore, the material question in the case.—*Sanders v. Knox*, 57 Ala. 80; *Levystein & Simon v. Whitman*, 59 Ala. 345.

The mortgage of January 23, 1880, recites, among other things, that the defendants are justly indebted to the plaintiffs, "*two hundred and thirty-six 24-00 dollars, being the balance due on a mortgage executed by us on the 24th day of March, 1879;*" and the mortgage is executed to secure this balance as well as the other indebtedness mentioned therein. It is a cumulative security, as respects the balance due on the notes secured by the mortgage of 1879. The testimony being conflicting, it is competent for the plaintiffs to give in evidence any admission of the defendants, tending to render the truth of the contested point more satisfactory, or to impair the weight of the evidence introduced against them in respect to the alleged consent.—*Rutherford v. McIver*, 21 Ala. 750. The recitals of the mortgage are evidently an admission, not only of an indebtedness to the plaintiffs, at the date of its execution, in the amounts and on the debts stated, but also of a proper and correct application of previous payments by the consent of the defendants, given at the time the mortgage was executed, if not previously; for by such application the debt was reduced to the sum admitted to be the balance. The admission may not be conclusive; but should have been submitted to the jury to determine its weight and sufficiency in connection with the other evidence. If evidence be relevant to the issue, the court can not reject it, nor prohibit its consideration by the jury as to any issue, which it tends to prove.

The parol evidence was offered to identify the first two notes set out in the complaint with the debt referred to, as the balance due on the mortgage of 1879. For this purpose it was competent, if parol evidence was necessary. It does not vary or contradict the terms of the mortgage. While a different consideration from that recited in a deed can not be shown, it is permissible to show a greater or less consideration of the

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same character. Though the amount stated in the mortgage is less than the aggregate sum of the notes, its terms referred to a *balance* due on a larger indebtedness; and the parol evidence was admissible to identify the subject-matter, and to point out and connect the writing with the particular notes secured by the mortgage of 1879.—*Johns v. Church*, 12 Pick. 557; *Cowles v. Garrett*, 30 Ala. 341.

The charge given at the request of the defendants asserted a correct legal proposition. The charge requested by the plaintiffs is abstract, and was properly refused. There was no evidence that the defendants had been charged with the hire of the mules. It is erroneous, also, in that it omitted the requisite hypothesis, that the defendants consented to the application of the payment to the unsecured debt.

In suits upon notes, in favor of which exemptions are claimed to have been waived, the fact of waiver must be averred in the complaint, and may be specially contested by the defendant.—*Goetter, Weil & Co. v. Pickett*, 61 Ala. 387; Code, § 2849. When contested, a statement or recital of the waiver can not be embodied in the judgment, unless the plea is found untrue. The legal effect of the verdict rendered by the jury is to find the issue of waiver in favor of the defendants.

Reversed and remanded.

Bayzor et al. v. Adams.

Bill in Equity for Specific Performance and for Dissolution of Partnership and Settlement of Accounts.

1. *Bill in equity against married woman relieved of disabilities of coverture; when husband not necessary party; when bill not multifarious.* When a bill seeks to enforce against a married woman, who has been relieved of the disabilities of coverture, the specific performance of a contract for the sale of land, and joins as a defendant another married woman, also relieved of the disabilities of coverture, on an allegation that the former had subsequently sold the same land to her, the husband of neither defendant is a necessary or proper party; and if the bill also seeks the settlement of a partnership between the complainant and the husband of the second defendant in carrying on a mill business on the land, as to which the husband only is a proper party defendant, it is multifarious.

APPEAL from Butler Chancery Court.
Heard before Hon. JOHN A. FOSTER.

[Bayzor et al. v. Adams.]

The original bill in this case was exhibited on 16th September, 1884, by T. J. Adams against John M. Sims, Malissa M. Sims, N. M. Bayzor and Lucinda Bayzor. The facts are sufficiently stated in the opinion.

GAMBLE & RICHARDSON, for appellants, cited 16 Ala. 87; 72 Ala. 303; 67 Ala. 397; 63 Ala. 363; 72 Ala. 210; 70 Ala. 318; *Id.* 460.

J. F. STALLINGS, *contra*.

STONE, C. J.—One purpose of the amended bill is to obtain specific performance of a contract, alleged to have been entered into by Mrs. Sims, by which she agreed to sell to complainant an undivided half interest in a certain mill property, with its attachments and appliances. To this bill Mrs. Sims is a necessary party, for the main relief is sought to be obtained from her. Mrs. Bayzor is also a necessary party to this feature of the bill, for it is averred that since the making of the contract with complainant, Mrs. Sims has conveyed the same interest in the property to Mrs. Bayzor. Both Mrs. Sims and Mrs. Bayzor had been relieved of the disabilities of coverture before any of these transactions occurred, and it follows that the husband of neither of them was a necessary party, so far as this feature of the case was and is concerned. According to the averments of the bill as amended, no other person was a necessary or proper party, to the claim set up for specific performance. But the amended bill presents another phase. It avers that after complainant purchased the half interest from Mrs. Sims, he and N. M. Bayzor formed a partnership for operating the mill together, and that such partnership continued in operation for several months. The bill prays a dissolution of the partnership, and a settlement of its accounts. To this feature of the bill N. M. Bayzor appears to be the only necessary or proper party defendant. This summary brings this case precisely within the general rule, “that a bill should not join distinct and independent matters, nor defendants against whom the complainant may have distinct and unconnected demands.”—*Lehman v. Meyer*, 67 Ala. 306; 1 Brick. Dig. 719–26, §§ 1158, 1170; *Junkins v. Lovelace*, 72 Ala. 303.

The demurrer for multifariousness should have been sustained.

Reversed and remanded.

Glass v. Glass.

Citation of Guardian by former Ward to Final Settlement of Guardianship.

1. *Final settlement of guardian's accounts ; when Probate Court has not jurisdiction.*—The Probate Court has no jurisdiction to make a final settlement of a guardian's accounts during the minority of the ward, and while the legal relation between them still exists.

2. *Same ; (this case).*—Where the record shows that the guardian's accounts for final settlement were filed on the 14th November, and his resignation filed on the 14th January afterwards, on which day also a final settlement of his accounts was made with the court, the settlement is void, and can not be supported on the principle of retrospective relation.

APPEAL from the Probate Court of Marengo.

Heard before Hon. JAMES W. TAYLOR.

On 9th March, 1885, William B. Glass, for himself, and as administrator of the estate of Samuel T. Glass, his brother, a minor, recently deceased in the State of Texas, filed his petition in the Probate Court of Marengo county, averring that Williamson Glass, who was the guardian of petitioner during his infancy and of said Samuel T. Glass during his life-time, had never made a final settlement of his guardianship of his said wards, William and Samuel T. Glass ; and prayed that the said Williamson Glass be cited to produce his accounts and vouchers in order that such final settlement might be had. Citation having accordingly issued, on the hearing, the said Williamson Glass introduced the record of a decree rendered by the Probate Court of Marengo on the 14th January, 1878, which purported to be a final settlement of his accounts as guardian, and which contained the following language : " It is further ordered, adjudged and decreed that the said William B. and Samuel T. Glass, minors, by their said guardian *ad litem*, L. W. Reeves, have and recover of said Williamson Glass, as such guardian aforesaid, the sum of eight hundred and fifty-three and 33-100 dollars, due to the said minors jointly, as herein before ascertained ; for which execution may accordingly issue. But now comes the said Levi W. Reeves, attorney in fact and of record for said minors, and acknowledges in open court full satisfaction of said decree, in favor of said minors. It is therefore ordered, that no execution ever issue for the said amount. And the said Williamson Glass having filed his resignation as guar-

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dian of said minors, it is ordered and decreed, that the same be received and recorded, and that the said Williamson Glass be discharged from further accountability as such guardian, to this court." "Thereupon," as recited in the bill of exceptions, "the said William B. Glass, individually, and as administrator of the said S. T. Glass, deceased, offered in evidence the whole record in the matter of the guardianship of Williamson Glass." Among the papers introduced was the account for final settlement filed by the said Williamson Glass and endorsed: "Filed Nov. 12, '77," and his resignation as guardian, dated "Linden, Jan'y 14, 1878." To the introduction of this account the said Williamson Glass objected; and here assigns the overruling of his objection, with other adverse rulings of the court, as error.

W. H. TAYLOE, for appellant.

TOULMIN, TAYLOR & PRINCE, *contra*.

SOMERVILLE, J.—When this case was before us at the last term, we decided that a settlement of accounts by a guardian, made during the minority of the ward, and without a previous resignation of the guardian, or other lawful termination of the relationship, was void for want of jurisdiction of the Probate Court in which the proceedings were had.—*Glass v. Glass*, 76 Ala. 368; *Lewis v. Allred*, 57 Ala. 628; *Lee v. Lee*, 67 Ala. 406.

The manner in which a guardian is authorized to resign is clearly stated in the statute. His resignation is required to be in writing, subscribed by him, and filed in the court from which his letters of guardianship issued. This becomes a court paper and is required to be entered of record.—Code, 1876, § 2768.

The record in this cause shows that the guardian's account for a final settlement was filed on November 12, 1877, or more than two months before the date of his resignation, which was January 14, 1878. The final settlement was made on the date of his resignation, and not until then. This could not operate retrospectively by relation to confer jurisdiction from the date when the Probate Court undertook to assume such jurisdiction.

The action of the Probate Court in declaring this settlement void, and in compelling the appellant to another settlement, was free from error, as are also the other rulings of the court which are assigned for error.

Affirmed.

McClenny v. Ward.

Bill in Equity for Reformation and Foreclosure of Mortgage.

1. *Amendment of original bill ; notice to defendant.*—A defendant who is in default, and against whom a decree *pro confesso* has been entered on the original bill, is nevertheless entitled to notice of a material amendment, alleging additional facts, and praying additional relief.

APPEAL from Henry Chancery Court.
Heard before Hon. JNO. A. FOSTER.

OATES & COWAN, for appellant.—1. The Chancery Court erred in allowing the amendments to the original bill without notice to the defendant as required by Rule of Chancery Practice No. 47, Subd. 3. *Holly v. Bass, adm'r*, 63 Ala. 387. (2.) The decree is erroneous because service of the amended bill was not perfected on the defendant. *Masterson v. Masterson*, 32 Ala. 437; *Alston v. Alston*, 34 Ala. 15. (3). There was error in the rendition of the final decree without decree *pro confesso* on amended bill.

D. C. BLACKWELL, *contra*.

CLOPTON, J.—The decree must be reversed, because of the failure to give the defendant notice of the amendment to the bill.

A decree *pro confesso* on the original bill was entered against the defendant on personal service. Afterwards an amendment was made to the bill, alleging that there was a misdescription of the land in the mortgage, which the bill was brought to foreclose, and seeking its reformation. The amendment was filed September 21, 1885; and on the next day, the cause was submitted for a decree, and a decree made reforming the mortgage. The defendant was required to answer the amendment; but the record does not show that any order was made that a notice that the bill had been amended should be entered on the order book, or that notice was so entered or otherwise given to the defendant. Though the defendant is in default on the original bill, notice of an amendment, alleging other material facts, and praying other and additional relief, should be given as provided by rule 47 of Chancery Practice; or by a summons

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to answer. Without notice, a decree can not be regularly rendered on the amendment. *Holly v. Bass*, 63 Ala. 387; *Masterson v. Masterson*, 32 Ala. 437.

Reversed and remanded.

Ordway & McGuire et al. v. White, Handley et al.

Bill in Equity to have Mortgage declared a General Assignment.

1. *General assignment; what constitutes.*—A mortgage given by a debtor to one of his creditors will be declared a general assignment at the instance of the others (Code, § 2126), if it conveys substantially all of his property that is subject to the satisfaction of his debts; but the burden of proof on this issue is on them.

2. *Same; evidence sufficient to entitle complainants to decree.*—The only evidence being that of the debtor himself, who testifies that, at the time the mortgage was executed, he owned no other land than his homestead, besides the tract conveyed by the mortgage, and that his personal property was not worth one thousand dollars, this is sufficient to entitle the complainants to a decree.

APPEAL from the Chancery Court of Tuscaloosa.

Tried before the Hon. THOMAS COEBS.

This was a bill in equity exhibited on 2nd July, 1883, by Ordway & McGuire and judgment creditors of J. H. Ward & Co., against the said J. H. Ward and the firm of White, Handley & Co. The bill alleges that, in order to secure an indebtedness then past due, the said Ward and his wife had executed to the said White, Handley & Co. a mortgage on a tract of land, which constituted substantially all of the property of the said Ward that was subject to the satisfaction of his debts. The bill prayed that this conveyance, a copy of which was made an exhibit, be declared a general assignment, and that the lands embraced therein be sold for the benefit of all the creditors who should come in and make themselves parties under the rules and practice governing creditor's bills. The decree of the chancellor adjudging that complainants were not entitled to relief, and dismissing their bill, is here assigned as error.

VAN HOOSE & POWELL, for appellants.

A. C. HARGROE and W. C. JEMISON, *contra*.
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STONE, C. J.—The conveyance in this case is, in form, a mortgage, securing one creditor, and, for that purpose, conveys a tract of land. The bill is filed by other creditors, and seeks to have the mortgage declared a general assignment. In such issue, the burden of proof is on the complainants. The principal testimony relied on by complainants is that of the mortgagor, Ward. His testimony is, that in addition to the lands conveyed by the mortgage, he owned no real estate other than his homestead. His exact language in reference to his personal property, as found in his deposition, is as follows: "At the time I gave the said mortgage to White, Handley & Co., all of my personal property was not worth one thousand dollars in cash." There is no testimony in the transcript that tends in the slightest degree to show a larger amount of personal property owned by Ward, or that his testimony is in any respect untrue. We think the complainants made sufficient proof to establish the averments of their bill, and that at the time the mortgage was executed, it conveyed substantially all the property the mortgagor owned liable to the satisfaction of his debts. *Shirley v. Teal*, 67 Ala. 449; *Du Bose v. Carlisle*, 51 Ala. 590; *Danner v. Brewer*, 69 Ala. 191.

The decree of the chancellor is reversed, and here rendered, granting to complainants the relief prayed. The cause will be remanded that the chancellor may make the proper orders for carrying the decree into effect.

Reversed, rendered in part, and remanded.

Walker et al. v. Daimwood & Norris et al.

Bill in Equity to Enforce Mechanic's Lien.

1. *Mechanic's lien; when court of equity has no jurisdiction to enforce.* A mechanic's lien is created by statute, which also prescribes the remedy for its enforcement, in many respects analogous to a bill in chancery, or a proceeding *in rem* (Code, §§ 3440-49); and a court of equity can not take jurisdiction to enforce this lien, "in the absence of some special ground of equitable interposition, such as would render inadequate the remedy at law."

APPEAL from the Chancery Court of Marengo.

Heard before the Hon. THOMAS COBBS.

The bill in this case sought the enforcement of the complainants' alleged mechanic's liens, and was filed on 20th Feb-

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ruary, 1884, by Daimwood & Norris, and others, artisans and material men, against W. J. Fellows and Alice L. Walker, trustee, and her children and *cestuis que trust*, named in the deed of trust, made an exhibit to the bill. The trust estate consisted of a tract of land in the county of Marengo, and the bill alleges the lease by the said Alice L. Walker of a particularly described lot of ground, a portion of the trust estate, to the said W. J. Fellows; and averred that the said Alice L. Walker "authorized and permitted William C. Fellows, for the immediate use, enjoyment or benefit of the said Alice L. Walker, Maggie J. Fellows, formerly Maggie J. Walker, and the other beneficiaries named in said deed of trust, to build and complete (upon said lot) a large and commodious dwelling, with servant's house, stable," &c., in the construction and erection of which, and in providing the necessary material therefor, the several demands of complainants originated. A nominal portion of the complainants claim was paid by the said Fellows leaving an aggregate unpaid balance of \$880.40. The bill averred the creation and existence of the debts due the several complainants and alleged that each of said demands had been duly itemized, verified and filed in the Probate Court as required by the statute governing mechanic's liens; and prayed that complainants be entitled each "to a statutory lien, by virtue of the premises stated, upon said lot and the houses thereon," and in default of payment that said houses and lot be decreed to be sold for the payment of the sums due complainants. Answers were filed by all the defendants; but it is not necessary to an understanding of the opinion of the court that they should be here noticed. Upon final hearing, upon pleadings and proof, the chancellor was of opinion that the complainants were entitled to relief; and caused a decree to be entered in accordance with the prayer of the bill. This decree is here made the basis of the assignments of error.

BROOKS and ROY, for appellants.

JOS. R. & S. W. JOHN, and TAYLOR and JOHNSTON, *contra*.

SOMERVILLE, J.—In *Chandler v. Hanna*, 73 Ala. 390, it was expressly decided by this court that a court of chancery could not assume jurisdiction to enforce a mechanic's lien, created under the statutes of this State, in the absence of some special ground of equitable interposition, such as would render inadequate the remedy prescribed in a court of law. It was said in that case that "the jurisdiction and the remedy, being bounded by the statute, can be pursued and exercised only before the tribunals and in the mode the statute provides. Other

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tribunals can not exercise the jurisdiction without enlarging the operation of the statute."

The statute prescribes, for the enforcement of mechanic's liens, a civil action in a court of law, which in many respects is analogous to a bill in chancery, or an ordinary proceeding *in rem*. The complaint is required to allege the facts necessary to confer the lien under the conditions fixed by statute, with a description of the property upon which such lien is sought to be enforced. The parties to the contract, by virtue of which the lien accrued, are necessary parties to the action, and all other persons interested in the property or controversy, are proper parties within the discretion of the plaintiff.—Code, 1876, §§ 3446–3447. The lien may be enforced against the separate property of married women, and of mere *cestuis que trust*, as well as other owners or proprietors of any interest in land, for whose immediate use, enjoyment or benefit any building or improvement thereon may be erected.—Code, § 3460.

We find no averments in the present bill which will rescue this case from the rule declared in *Chandler v. Hanna, supra*. No fact is stated which shows that the rights claimed by the complainants can not be enforced as well in an action at law as in a court of equity. Their remedy, if any they have, must be in a tribunal upon which the statute, creating the lien, has conferred jurisdiction.

The chancellor erred in assuming jurisdiction and in rendering the decree in the cause. The chancellor's decree will be reversed, and a decree will be rendered in this court dismissing the bill.

England v. Hatch.

Statutory Real Action, in Nature of Ejectment.

1. *Defective probate of deed; when certified copy not evidence.*—When a deed has been recorded within twelve months from its date but the certificate of probate or acknowledgment is substantially defective (Code, § 2154), a certified copy is not admissible as evidence without further proof.

2. *Conveyance recorded more than twenty years presumed to have been properly probated.*—Under the rule laid down in *Hutchings v. White*, 40 Ala. 253, if the deed has been recorded in the proper office for more than twenty years, the presumption will be indulged that its execution was legally proved or acknowledged; but the court is unwilling to extend the rule to deeds which have not been recorded twenty years.

3. *Plaintiff in ejectment must recover on strength of his own title.*—In ejectment, or statutory action in the nature of ejectment, the plaintiff

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must recover, if at all, on the strength of his own title; and when he fails to make out a *prima facie* case, the defendant is not required to adduce any evidence, nor will erroneous rulings on evidence offered by the defendant work a reversal.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JOHN MOORE.

This was a statutory real action in the nature of ejectment brought by Wade H. England against Susan W. Hatch, to recover certain lands particularly described in the complaint, and was commenced on 25th April, 1884. The defendant pleaded not guilty, the statute of limitations of ten years, and adverse possession, for three years, with a suggestion of the erection of valuable improvements. Issue was joined on these pleas; the trial resulting in a verdict and judgment for the defendant. The material facts in the case are sufficiently disclosed by the opinion. The certificate of probate, the sufficiency of which was the chief contention developed in the primary court, is in the following language:

"State of Alabama, Wilcox county. On this, 23d day of March, in the year one thousand eight hundred and sixty-six, personally came before me Drury Vick, one of the subscribing witnesses to the foregoing conveyance, and acknowledged that he signed the same as witness, and that R. C. Parker, the other subscribing witness, signed his name in his presence, and that James B. McBryde and Eliza A. McBryde, whose names are signed to the conveyance, signed the same in his presence and in the presence of R. C. Parker the other subscribing witness. And I certify that I well know the said Drury Vick, and that he is the same person whose name is subscribed as a witness to the foregoing conveyance.

"GEORGE LYNCH,

"Justice of the Peace."

JOHN Y. KILPATRICK, for appellant.

R. GAILLARD, and S. J. CUMMINGS, *contra*.

CLOPTON, J.—The plaintiff, having proved that he is the son and only heir at law of D. G. England, who died in June, 1868, and having read in evidence a deed made by W. H. Barnwell and wife, December 31, 1866, conveying the land in controversy to his father, offered for the purpose of showing title in Barnwell, a transcript of a deed, and the endorsements thereon, as the same appear of record in the office of the judge of probate of Wilcox county. On objection by defendant, the court excluded the transcript. The specific objections made in the Circuit Court are; that the execution of the deed

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had not been proved, and that it had not been acknowledged, nor probated as required by the statute.

The transcript was offered in evidence under section 2154 of the Code. The deed was recorded within less than twelve months from its date, and the loss of the original conveyance was sufficiently proved; but the probate does not substantially conform to the requirements of the statute. To be sufficient, the substantial facts as declared in the statutory form of probate of conveyance, must be expressed in the certificate. The certificate does not show that the grantors voluntarily executed the conveyance, nor that the probating witness attested it in their presence. And it appears, that the probating witness was not sworn, and did not depose, but merely acknowledged the facts stated in the certificate.—*McCaskle v. Amerine*, 12 Ala. 17; *Sharpe v. Arme*, 61 Ala. 263; *Boykin v. Smith*, 65 Ala. 294.

It is insisted, that the deed falls within the rule laid down in *White v. Hutchings*, 40 Ala. 553, where it was held, that if the deed has been recorded, more than twenty years in the proper office in the proper county, the presumption is, that its execution had been legally proved or acknowledged; that a proper certificate had been written upon or under the deed; and on proof of its loss, a duly certified transcript must be received. The transcript offered in evidence does not come within this rule, inasmuch as the deed had not been recorded twenty years before the day of trial; and we are unwilling to extend the rule. The certificate of probate not being effective to impart probative force to the deed, it devolved on the plaintiff to prove its execution and the correctness of the copy. Evidence that the subscribing witnesses were dead, and that the grantors had removed beyond the limits of the State, is insufficient for this purpose. The transcript was properly excluded.

The record discloses no evidence tending to show, that the plaintiff, or those under whom he claims, ever had possession of the lands; but on the contrary, it tends to show that the defendant and those from whom she derives title, had been in possession since 1844. The plaintiff in a statutory real action, as in common law ejectment, must recover on the strength of his own title. When the plaintiff closed his evidence, the defendant might have rested on the then state of proof. We discover no valid objection to the admissibility of the muniments of title introduced by the defendant. The execution of the conveyance from Kimbrough and wife, to Watkins, was proved, and the will, its probate, and the partition of the lands duly certified. But if they were inadmissible, it would not work a reversal, as the plaintiff was not entitled to recover on the case made by him.—*Crosby v. Pridgen*, 76 Ala. 385; *Baker v. Barclift*, 76 Ala. 414.

Affirmed.

Eureka Company v. Edwards.

Bill in Equity to Cancel Deed as a Cloud upon Complainant's Title.

1. *Motion to amend answer after hearing decision on the merits ; when properly refused.*—After a hearing and decision on the merits in a chancery cause, a motion to amend the answer, by incorporating a demurrer to the bill on account of a technical defect which is amendable, and which exerted no influence in the decision of the case, is properly refused.

2. *Motion to take further testimony ; when properly overruled.*—A motion to take further testimony as to an important issue of fact, merely cumulative to the testimony already taken, and to be used on an application for a rehearing, is properly overruled.

APPEAL from Tuscaloosa Chancery Court.

Heard before Hon. THOMAS COBBS.

Reference is had to the previous report of this case in 71 Ala. 248, for a statement of the facts. The present appeal is based upon the overruling by the primary court of certain motions made by the appellant after remandment,—the nature of which is indicated in the opinion.

STONE, C. J.—We are not prepared to say the chancellor misinterpreted the decision pronounced by this court, when this cause was formerly before us.—71 Ala. 248–257. The remandment then ordered expressed on its face what its purpose was—namely: “That the complainant may have the relief prayed by its bill.” Probably the correct inference to be drawn from this language is, that this court preferred that the chancellor should himself direct and supervise the partial cancellation of the deed, rather than, by pronouncing final decree here, to leave it to the unassisted judgment of the register to execute so delicate a function. We need not decide this.

The motions made and overruled by the court below were—

First: To amend the original answer, by adding a demurrer thereto on a specified ground. If there had been no pretense of a final decree by this court, that motion, made as it was after a trial on the merits, should have been denied. It simply sought to point out an imperfection in the bill, easily and naturally remediable by amendment, and which had exerted no influence in the preparation of the cause, nor in the relief claimed and granted. To have allowed such amendment at

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that stage, would have been an abuse of discretion. For the same reason, the chancellor did right in overruling the motion to dismiss the bill; for that motion was based on the same imperfection in the bill, which had been attempted to be reached by the amendment offered. Discretionary powers should be exercised in promotion, and never in delay of justice.

Motion was likewise made in the court below, for leave to take further testimony, the avowed object being to make further proof that J. C. Burgin and Ann Judkins Thrasher were of adult age when they executed the deed under which Edwards and his associates claim title. This was the most important issue of fact in the cause, and testimony *pro* and *con* was taken upon it before the first hearing was had. The motion, made after publication and after a hearing on the merits, was for leave to take further testimony, simply and purely cumulative of testimony previously taken to prove the same fact—such new testimony to be used on a rehearing of the cause. Such motion should be overruled.—*Gordon v. Tweedy*, 74 Ala. 232.

We are perfectly content with our rulings when this case was formerly before us.

Affirmed.

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Bill of Interpleader.

1. *Execution issued after death of plaintiff.*—An execution issued after the death of the plaintiff therein is void, and all proceedings taken under it are void; hence, the plaintiff's attorney, who controlled the execution, and who knew the fact of her death, can not claim compensation for the collection of the money under it.

2. *Money in custody of court entrusted to solicitor on his giving bond therefor; proper mode of compelling payment.*—When money in the custody of the court is allowed to go into the hands of a solicitor, on his giving bond to keep it subject to the order of the court, and to pay it as the court may direct, he may be compelled to pay over the money by the summary process of attachment, of which he should have notice, and an opportunity to show cause against the order. But the court has no power to order a summary execution against the sureties on his bond. *Dudley v. Witter*, 51 Ala. 456, overruled.

APPEAL from Randolph Chancery Court.

Heard before Hon. N. S. GRAHAM.

This was a bill of interpleader exhibited on 26th September, 1873, by William J. Alexander against W. J. Borden and William H. Smith, the case made by the record, so far as essential

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to this report, being substantially as follows: The complainant, as sheriff of the county of Cleburne, received from the register of the Chancery Court of Randolph, twelve several executions in favor of Margaret E. Smith against her former husband, Jeremiah Smith, which were issued on a decree rendered in 1859 divorcing the said Margaret E. and Jeremiah Smith, granting the former an annual allowance of \$100.00 as alimony out of his estate. The entire series of executions, embracing the amounts due as such alimony from 1861 to 1872, inclusive, was received by complainant in 1873 and duly levied on the real estate of the defendant therein—the amount collected and remaining in complainant's hands, after deducting expenses of sale, &c., being \$1346.50. This fund, as averred in the bill, was claimed by the respondent, W. J. Borden, as the alleged administrator of the estate of the plaintiff in execution (who had moved to Kansas or Texas a number of years before), and exhibited his letters of administration, dated on or about March 3d, 1873. The said Borden claimed the amount as assets of his decedent's estate, and threatened the complainant and the sureties on his official bond with suit in the event of non-compliance with his demand. A counter claim was asserted by the respondent, W. H. Smith, who insisted that the said Margaret E. was not dead, and that he, as her attorney of record, was entitled to receive and control the fund. The bill prayed the direction of the court as to the disposition of the amount in controversy, and that the defendants be required to interplead and determine between themselves their respective claims thereto. The answers filed by the respondents were in substantial accord with the allegations of complainant's bill. The chancellor caused an order to be entered directing the payment of the money into court and discharging the complainant from all liability in the premises; and further ordered, that the fund be paid over to the said Wm. H. Smith, upon his entering into bond in a sufficient sum "conditioned to have the said money (less the amount which may be allowed him as counsel fees)" subject to the further order of the court. A reference was ordered to the register to ascertain, among other things, the date of the alleged death of said Margaret E. Smith, and a proper allowance of counsel fees.

The remaining facts are sufficiently indicated in the opinion.

SMITH & LOWE, for appellant.

SOMERVILLE, J.—The first assignment of error is based on the chancellor's confirmation of that portion of the register's report having reference to the amount of counsel fees allowed appellant, Smith, as solicitor in the cause. This allowance does

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not appear, in our opinion, to be unreasonably small, according to our understanding of the testimony. It is shown that Mrs. Margaret E. Smith was deceased at the time of the issue of the execution in her favor, and of the collection of the money by the sheriff, and this fact was known to the appellant, who, as attorney in the cause, was controlling the execution. The execution was, therefore, void, as were all proceedings taken under it.—*Stewart v. Nuckols*, 15 Ala. 225; Freeman on Executions, § 35. For the collection of this money the attorney was not entitled to charge any fee.

The funds thus realized, having been in the custody of the Chancery Court, and allowed to go into the hands of appellant Smith, as a solicitor and *quasi* officer of the court, were held by him in a trust capacity. His undertaking was to keep the money subject to the order of the court, and to pay it as the court might direct. The trust and confidence thus reposed in, and assumed by him, rendered him subject to the summary jurisdiction of the court. The chancellor could, therefore, according to an elementary principle of equity, compel him to pay over the fund, according to his directions, by the summary process of attachment. In all such cases, however, there should be notice, and an opportunity to show cause should be afforded the delinquent party.—*Pinkard v. Allen*, 75 Ala. 73.

The Chancery Court, however, had no jurisdiction to order an execution against the sureties on Smith's bond, especially without giving them notice. They had no custody of the money, and their's was no trust relationship. Their obligation was purely legal, the condition of the bond being that their principal should keep the fund subject to the order of the court. Upon such a bond as this the chancellor had no power to render a judgment. The sureties were entitled to their day in a court of competent jurisdiction, where they could be heard in presenting their defense, if any they had. The chancellor should have ordered the register to sue on the bond in a court of law in order to charge the sureties, as is the practice in the case of a receiver's bond, from which the present obligation can not be distinguished in its essential features.

The case of *Dudley v. Witter*, 51 Ala. 456, is opposed to this view, and to this extent is overruled as unsupported by either principle or precedent.

The decree of the chancellor is reversed and the cause remanded.

Wood v. Wood.

Bill for Divorce.

1. *Divorce ; actual or apprehended violence as ground of.*—The wife is entitled to a divorce when the husband has committed actual violence on her person, attended with danger to life or health, or when, from his conduct, there is reasonable apprehension of such violence. (Code, § 2687.) But, to bring a case within this statute, actual violence, or a reasonable apprehension thereof, must be shown ; and insulting words, offensive manners, want of civil attention, or other conduct which shocks the sensibilities, wounds the feelings, and causes grief and domestic unhappiness, is not sufficient.

APPEAL from the Chancery Court of Henry.

Heard before Hon. JNO. A. FOSTER.

The bill in this cause was filed by the appellant, a married woman, by next friend, against her husband, the appellee, on 18th March, 1885, and sought a divorce *a vinculo matrimonii*. The case made by its allegations is sufficiently disclosed by the opinion. The respondent demurred to the bill: “(1) Because said bill fails to aver or set forth any actual violence committed by respondent on complainant’s person, attended with danger to life or health;” “(2) Said bill fails to aver or set forth such circumstances or actions in the conduct of respondent which warrant a reasonable apprehension of actual violence by respondent on the person of complainant attended with danger to the life or health of complainant.” The decree of the chancellor sustaining the demurrer is here assigned as error.

CASSIDY & BLACKWELL and WATTS & SON, for appellant.—Bishop on Marriage and Divorce, 1 vol., § 717, gives the following definition in one of his late editions: “Cruelty is therefore such conduct in one of the married parties as renders a continuance of the cohabitation either so dangerous to either in fact, or attended with such reasonable apprehensions of danger in the mind of the other * * * * * as to demand a separation on the ground of the real physical safety of the other, &c. As to cruelty in Alabama, see *Smedly v. Smedly*, 30 Ala. 714, where the following language occurs: “But there may be cruelty in him without actual violence. Thus, if he starve his wife, or if he refuse to supply her with the necessaries of life when it is in his power to supply them, it is cruelty in him.” See also, 1 Bishop, vol. 1, § 725; *Rice*

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v. Rice, 6 Ind. 100. If the term "cruelty," as employed in our statutes, is to have its popular exposition, it extends *beyond* mere blows, or threatened blows. In popular phrase, men are often cruel to their wives though neither inflicting nor threatening blows. Bishop, 1 vol., §§ 725 and 732; *Hughes v. Hughes*, 19 Ala. 307. It is cruelty in the husband to confine his wife; or knowingly to deprive her of needful air; or to starve her; or, having the means, to refuse her the necessities of life; or to withhold medical assistance in sickness, while he is able to provide it. Bishop, 1 vol., § 735; 1 Robertson, 106.

OATES & COWAN, *contra*.—(1). The allegations of the bill fail to show any actual violence inflicted on the person of the wife or such conduct on the part of the husband as generates a reasonable apprehension of such violence. *Folmar v. Folmar*, 69 Ala. 84; *Hughes v. Hughes*, 44 Ala. 698. (2). Paragraph 5 of the bill is but the averment of a conclusion. It does not set forth the facts upon which that conclusion is based. Averments of conclusion are insufficient to sustain the bill. *Hill v. Hill*, 10 Ala. 527; *Hughes v. Hughes*, 19 Ala. 311.

CLOPTON, J.—So long as the statute was in force, which made the cruel, barbarous and inhuman treatment of the husband a ground of divorce in favor of the wife, the question of the kind and degree of cruelty was open for adjudication by the courts; and included the scope of the ingenuity of an unmanly, heartless and tyrannical man to devise plans to harass and torture a refined and sensitive woman, as endangering to life or health, though it may be more lingering in its operation, as personal violence. The present statute, under which this bill is brought, undertakes to define the kind and degree of cruelty necessary to constitute a cause of divorce. The language is: "In favor of the wife, when the husband has committed actual violence on her person, attended with danger to life or health, or when, from his conduct, there is reasonable apprehension of such violence." Under the statute, it is requisite that there shall be physical or bodily violence or a reasonable apprehension of such violence, as distinguished from harsh and criminary words, rude and offensive manners, want of civil attention, or other conduct, which wounds the feelings, shocks the sensibilities, and occasions grief, and sorrow, and domestic infelicity, but do not cause a reasonable apprehension of bodily harm. Such has been the construction of the statute since its enactment. *Folmar v. Folmar*, 69 Ala. 84; *Goodrich v. Goodrich*, 44 Ala. 670. With this judicial construction the statute was re-enacted, and incorporated in the Code of 1876. (§ 2687.) Other conduct or words, insulting,

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offensive or neglectful, may be received in aid of proof of personal violence, actual or threatened, as tending to show, whether it is attended with danger to life or health, or whether the conduct is of a character to cause such reasonable apprehension. This is the purport of the decision in *Smedly v. Smedly*, 30 Ala. 714, when construed in reference to the facts of the case.

The allegations of the bill, which are taken as true on demurrer, make a case of an absence of common attention; a non-observance of the most ordinary courtesies; heartless neglect; an unfeeling indifference to the comfort and relief of his wife in sickness; a disregard of the obligations of marital vows; holding the wife in the capacity of a menial servant, when able to relieve her from such service, instead of an equal and companion in life; viewing the marriage relation as merely physical and sexual; and a want of affection for his own offspring. While the bill makes a case of treatment and conduct, disgraceful to the husband, and deplorable to the wife, productive of domestic unhappiness, there is no allegation of actual violence on her person, or of threat or conduct, from which there is reasonable apprehension of such violence.

Affirmed.

Striplin & Co. v. Cooper & Son.

Bill in Equity to Enjoin Action of Ejectment, and to Remove Cloud on Title.

1. *Conveyance of homestead by married man without signature and assent of wife.*—An absolute conveyance of his homestead by a married man, without the voluntary signature and assent of his wife, is a nullity, and an executory agreement to convey is equally null and inoperative.

2. *Title of purchaser at sheriff's sale under judgment in attachment relates back to levy of attachment.*—A purchaser at sheriff's sale, under a judgment in an attachment case, acquires a title which dates back to the levy of the attachment, and overrides an intermediate conveyance by the defendant.

3. *Same (this case).*—Where the owner of a homestead, having made an executory sale, in which his wife did not join, afterwards removed from the premises, and an attachment was then levied on the land; a purchaser at the sheriff's sale, under the judgment in the attachment sale, acquires a title which must prevail over that of an assignee of the title-bond, to whom a conveyance was executed after the levy of the attachment.

APPEAL from Randolph Chancery Court.

Heard before Hon. N. S. GRAHAM.

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SMITH & SMITH, for appellants.

G. C. ELLIS, *contra*.

SOMERVILLE, J.—The purpose of the bill is to enjoin an action of ejectment brought by the appellants against appellees, Cooper & Son; also, to have cancelled, as a cloud on their title, a sheriff's deed held by the respondents, and to enforce as against them what is claimed to be a perfect equitable title to the land in controversy.

It is a fact of vital importance in the case that the premises in question were once the homestead of one A. M. Wortham, being less in value than three hundred dollars, and of an area not exceeding eighty acres. The complainants in the bill derive their title through him. Being at the time a resident of the State and a married man, and while yet in the actual occupancy of this homestead tract, A. M. Wortham, in December of the year 1881, made an executory sale of the land to one I. F. Wortham, executing to him a bond for title, signed by himself alone. In the making of this instrument his wife did not join. The vendee gave his promissory notes to the vendor for the purchase-money, payable in the sum of three hundred dollars.

On the fifteenth of October, 1882, the vendor abandoned the premises and removed to the State of Texas.

Very soon afterwards—on October 28, 1882,—the complainants became the assignees of the bond for title by purchase from the vendee, I. F. Wortham. In March, 1883, the original vendor and his wife, being then in Texas, executed a deed of conveyance to the complainants upon their making payment of the purchase-money.

The title of the defendants, Striplin & Co., is derived through a sheriff's deed. Immediately after the abandonment of the homestead premises by A. M. Wortham, two writs of attachment were sued out against him in a justice's court, and were levied on the land for want of personal property,—the first being levied October 16, 1882, and the other November 1st, following. Judgments were rendered in these suits in December, and an order of sale was granted by the Circuit Court in May, 1883, authorizing the sheriff to sell the premises. This order he executed in August following, and at this sale the defendants purchased, receiving a deed from the sheriff in due form.

Under the uniform decisions of this court the attempted sale of the premises to I. F. Wortham conveyed to him no interest whatever, legal or equitable. A mortgage or other alienation of a homestead by the owner, if a married man, is a mere

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nullity without the voluntary signature and assent of the wife. *Alford v. Lehman*, 76 Ala. 326, and cases cited. An executory agreement to convey a homestead could not possibly stand on any better basis, or confer any greater right. Even if signed by the wife, specific performance of it could not be enforced by a court of equity against her consent.—*Jenkins v. Harrison*, 66 Ala. 346; *Blythe v. Dargin*, 68 Ala. 370.

The vendee in the bond for title, having no interest in the land himself, could convey none to the complainants by the assignment of this instrument to them. The complainants must, therefore, rely exclusively upon their deed from A. M. Wortham and wife, bearing date in March, 1883.

The title of the appellants, Striplin & Co., is superior to this. They did not purchase, it is true, under their sheriff's deed until August, 1883. But the lien of the process under which their title was acquired dated back to the levy of the writs of attachment on the land in October, 1882, which was prior not only to the delivery of A. M. Wortham's deed to complainants, but also of the assignment to them of the bond for title under which they claim their equity. This levy created a lien which would override and defeat any subsequent conveyance of the land, intermediate between such levy and the issue of a *venditioni exponas*, or made even prior to the rendition of judgment in the attachment suit.—*Randolph v. Carlton*, 8 Ala. 606; *Reed v. Perkins*, 14 Ala. 231; *Scarborough v. Malone*, 67 Ala. 570.

The decree of the chancellor in this cause might well be reversed and the cause remanded on the authority of the case of *Alford v. Lehman, Durr & Co.*, 76 Ala. 526, *supra*. The principles settled in that decision are conclusive of this case.

Reversed and remanded.

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Bill in Equity to Enjoin Sale of Mortgaged Premises under Power Contained in the Mortgage.

1. *Delivery of mortgage; what sufficient proof of.*—A mortgage being duly signed, acknowledged before a proper officer, and left, with the secured note, in the hands of the mortgagee and payee, this is a *prima facie* sufficient proof of delivery; and the rights of third persons, afterwards accruing, can not be affected by subsequent efforts to rescind the contract, or demands for the return of the papers.

2. *Negotiable paper; when holder entitled to protection.*—When the
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consideration of a note is the sale and assignment of a patent right, and the payee obtains the possession by fraud without making the assignment, the fraud is available as a defense to the maker, as against the payee, or in the hands of a transferee if the note is not negotiable; but, if the note is negotiable, and is transferred before maturity, for valuable consideration, and in the usual course of business, the holder is entitled to protection.

3. *Same; duty of purchaser for valuable consideration, before maturity.* The purchaser of a negotiable note, before maturity, and for valuable consideration, is not bound to enquire of the maker whether there is any defect in it, or defense against it; but is entitled to protection, unless there was bad faith in his purchase or such gross negligence as is evidence of bad faith; and his purchase for value before maturity being shown, the *onus* of proving notice is on the maker.

4. *Discount of promissory note made for accommodation of payee; when usurious.*—When a promissory note is made for the accommodation of the payee, and is discounted for him at more than legal interest, it is usurious in the hands of the purchaser; but the principle does not apply to the purchase of a negotiable note before maturity, which was given in consideration of the sale and assignment of a patent, although the possession was obtained by fraud on the part of the payee, and without making the assignment.

5. *Assignment of note secured by mortgage carries with it the mortgage security.*—An assignment of a note secured by mortgage, carries with it the mortgage security, and authorizes the assignee to execute the power of sale therein contained.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. THOMAS COBBS.

This was a bill in equity by Thomas Wildsmith and his wife, Muschoga Wildsmith, against William Tracy, C. C. Seals and James T. Fitzgerald; and was filed on 13th May, 1884. The case made by the record is substantially as follows: On 2nd October, 1883, the complainants applied to C. Blackwood & Co., loan-brokers in Birmingham, to borrow for them \$1,600 for one year, the money to be used to purchase the right to collect a royalty in the states of Kansas and Mississippi on a certain patent railroad switch of which the defendant, William Tracy, was the inventor and patentee. To enable Blackwood & Co. to obtain the money, the complainants executed their promissory note for \$1,600, with two coupons for \$64.00 each, the amount of the semi-annual interest, thereto attached. This note was dated 2nd October, 1883, and made payable October 2nd, 1884, to the order of the defendant, William Tracy, at the First National Bank, in the city of Birmingham, and on its face declares that it and its coupons are secured by mortgage of even date therewith; and that on failure to pay the interest thereon the holder might, after the same had been due and unpaid for five days, collect both principal and interest at once. Contemporaneously with the execution of this note the complainants joined in executing to said Tracy the mortgage therein referred to as securing it. This mortgage was dated October 2nd, 1883, and was signed in the presence of

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two attesting witnesses; its voluntary execution being acknowledged by the complainants, both together, and the wife upon a separate examination under the statute before a notary public, who also took the proof of the execution of the instrument by the oath of one Haynesworth, one of the subscribing witnesses. The testimony shows that the note and mortgage were, as soon as executed, delivered to Tracy directly, or his attorney for him, or to C. Blackwood & Co. to be negotiated for the benefit of Tracy, who, in consideration of the \$1,600 to be raised on said note and mortgage was to convey to Wildsmith and wife the right to collect the royalty on said patent railroad switch. Tracy immediately, and in the presence of Wildsmith, and for the the purpose of facilitating its negotiation for his, Tracy's benefit, endorsed the note and assigned the mortgage in blank and handed them to Blackwood & Co. to negotiate and raise the money on them. Blackwood & Co. failed to negotiate the note and returned it to Tracy; and he, Tracy, about the 15th of October, 1883, sold and delivered the note and mortgage to the defendant C. C. Seals for the sum of \$1,200. The complainants aver that before the negotiation of the note and mortgage to Seals they demanded the papers back from Tracy and notified him that they had annulled and rescinded the contract because he had failed to convey to them the patent right to collect the royalty on the "Tracy switch" as he had agreed to do. They also, on the 11th October, 1883, published in the "Daily Age" newspaper of Birmingham a notice warning the public not to trade for or buy the note and mortgage given by them to Tracy, on the ground that they had annulled the trade and that the consideration thereof had failed.

On the 24th March, 1884, Tracy's endorsee, C. C. Seals, sold the note and mortgage, endorsing the note and assigning the mortgage, to the defendant, J. T. Fitzgerald, for a cash consideration of \$1,200 paid on that day. On the 2d April, 1884, the first interest coupon for \$64.00 became due; and, default being made, payment was demanded and refused, and Fitzgerald then proceeded, under the provisions of the note and mortgage to declare the whole debt due and to advertise and sell the lands covered by the mortgage under the powers conferred by it. At this point complainants filed their bill, and the injunction therein prayed was granted, pending the final determination of the cause. The bill seeks to have the sale of the lands under the mortgage perpetually enjoined and the note and mortgage delivered up and cancelled on the ground that fraud was practiced on the complainants by Tracy in obtaining the note and mortgage from them. A decree *pro confesso* was taken against the defendant, Tracy, who left the

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State shortly after transferring the note and mortgage to the defendant Seals. In their answers and testimony the said Seals and his co-defendant, Fitzgerald, both repudiate all knowledge, actual or constructive, of any defect or infirmity in the note and mortgage from the Wildsmiths to Tracy and aver that they acquired the same, before maturity, for valuable consideration, as innocent purchasers thereof. They both deny that they saw, or heard of the warning or notification published by the complainants in the "Birmingham Age" newspaper.

On final hearing, on pleadings and proof, the chancellor was of opinion that complainants were not entitled to the relief prayed for, and caused a decree to be entered, dissolving the temporary injunction and dismissing the bill. This decree is here assigned as error.

ROBERT H. STERRETT, for appellants.

J. J. GARRETT, *contra*.

CLOPTON, J.—The note and mortgage were signed, the execution of the mortgage acknowledged before a proper officer, and both were left in the possession of the payee of the note. The formal signing and acknowledgment of a conveyance, and possession of the grantee, are *prima facie* sufficient proof of delivery. Not only does a presumption of delivery arise on the facts, but Mrs. Wildsmith, one of the mortgagors, and the witness, Tegner, testify, in express terms, to a delivery, and the testimony of the other mortgagor shows, that it was intentionally put in possession of the mortgagee. The evidence leaves no room to doubt a delivery, sufficient to impart vitality; and subsequent efforts to annul the contract, or subsequent demands for the return of the note and mortgage will not defeat a prior completed delivery.

It is manifest on the evidence, that as between the complainants and the payee of the note, the defense is available; and would be sustained against the transferee if the note was non-negotiable. The *bona fide* sale and transfer of a negotiable note, before maturity, in the usual course of business, for a valuable consideration and without notice, creates in the transferee a paramount right of action against the maker; and frees and discharges the note of all defects, equities and defenses, to which it was subject before its acquisition by the holder.—*Capital City Ins. Co. v. Quinn*, 73 Ala. 558. The uncontradicted and unrebutted evidence shows, that Fitzgerald, the transferee, purchased the note before maturity, and paid a valuable consideration therefor without notice of any de-

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fense or infirmity, or equity between the immediate parties. He was under no legal obligation to inquire of the makers whether there was any defense or any defect in the note. He testifies that he never saw or heard of the notice published in the newspaper; he did not reside in Birmingham where it was published; and such publication is not sufficient notice unless brought home to him by positive proof, or by proof of circumstances, which authorize the inference of knowledge. The transfer to Seals, bearing date one day prior to the officer's certificate of acknowledgment, but the same date as the mortgage, which was attested by two witnesses, is alone insufficient. Knowledge of circumstances, that would excite suspicion in the mind of a prudent man, or gross negligence, will not alone defeat the purchaser's right of action. Bad faith in the purchase, or such gross negligence as is evidence of bad faith must be shown. Fitzgerald having proved that he acquired the note for value before maturity, want of notice is presumed, and the *onus* is on the complainants to show notice.—*Capital City Ins. Co. v. Quinn*, 73 Ala. 558; *Murray v. Lardner*, 2 Wal. 110; 1 Dan. on Neg. Ints., § 796.

It is insisted that the transaction by which Fitzgerald acquired the note is usurious. If a note, which is made for the accommodation of the payee, to enable him to raise money, is discounted at a higher rate than legal interest, it is usurious. But was the note in question made for the accommodation of the payee, in the legal meaning of accommodation paper? From the allegations of the bill, and the evidence of Wildsmith himself, it appears that the note was given in consideration of the patent to the "Tracy Switch," which Tracy sold and agreed to assign to him. The blank transfer, endorsed on the mortgage, with the knowledge and consent of Wildsmith, tends to show his knowledge of Tracy's intention to raise money by the negotiation of the note, but not in the nature of a loan by Wildsmith, or by the person to whom it might be transferred. The transaction, as set forth in the bill, was that Tracy agreed to sell to complainants the patent for the States of Kansas and Mississippi for the sum of sixteen hundred dollars, for which amount the complainants were to execute a note and mortgage on land, and Tracy was to assign the patent for those States to them. In pursuance of this agreement, the note and mortgage was executed. The transaction had all the elements of a contract. It did not have its inception in a loan of money, or forbearance of a debt, but in the purchase of the patent. The note and mortgage were intentionally delivered, though such delivery, we do not doubt, was procured by the fraud of Tracy. He could have brought an action on the note, though such action could have been defeated by setting up the

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defense of fraud. The distinguishing test is, whether the note never had an existence as between the immediate parties, because there was no intent to deliver, and no delivery in fact. The weight of the evidence sustains the conclusion that there was an intentional delivery, relying upon Tracy's promise and agreement to make the assignment of the patent; and, as we have said, there was a delivery in fact. Hence the efforts of complainants, on becoming dissatisfied, to rescind or annul the trade. When the maker of a note has intentionally issued it, subsequent efforts to rescind the contract can not defeat its prior inception, or destroy its negotiability, though the issue was procured by the fraud of the payee.—*Harper v. Wilson*, 63 Bart. 237. A note, which has an existence, in the hands of the payee, may be sold or bought, and its transfer, at a discount greater than the legal rate of interest, is not usurious, when not a device to avoid the statute. And when a purchaser for value takes a negotiable note, secured by a mortgage, discharged of all defenses, and freed from infirmity, and all equities, to which it was subject in the hands of any prior holder, the mortgage being a security and an incident, is in his hands entitled to the same protection accorded by the commercial law to the note.—*Saltmarsh v. P. & M. Bank*, 17 Ala. 768; *Noble v. Walker*, 32 Ala. 456; *Hawley v. Bibb*, 69 Ala. 52; *Carpenter v. Longan*, 16 Wal. 271.

An assignment of the mortgage with apt words to pass the legal title is not necessary. The assignment of the note carried with it the mortgage security; and the statute confers on any person who, "by assignment or otherwise, becomes entitled to the money thus secured," authority to execute the power of sale given to the grantee.—Code, § 2198.

Affirmed.

McMillan v. Wooten.

Trover.

1. *Agent; authority of.*—Authority to an agent "to trade off said mule, if he could get anything that suited him," does not empower him to exchange the mule for another, and bind his principal to pay a sum of money, as the estimated difference in value.

APPEAL from the Circuit Court of Marengo.

Tried before Hon. W. E. CLARKE.

[McMillan v. Wooten.]

This was an action of trover brought by J. J. McMillan against C. B. Wooten for the alleged conversion of a "mouse-colored mule;" and was commenced on 27th December, 1884. Issue was joined on the plea of the general issue, the trial resulting in a verdict and judgment for the defendant. On the trial, as shown by the bill of exceptions, the plaintiff introduced as a witness one Bill McMillan "who testified that he lived with the plaintiff, and that the plaintiff owned a small black mule, and that he, Bill McMillan, was working said mule; and that the plaintiff authorized him to trade off said mule if he could get anything that suited him: that subsequently he did trade said mule with the defendant for the mouse-colored mule mentioned in plaintiff's complaint and delivered the defendant the small black mule; and he agreed to pay the difference in the value of the mules which was agreed upon, respectively, \$100.00 for the small black mule, and \$125.00 for the mouse-colored mule; but defendant further agreed that if he sold the small black mule for more than \$100.00 that he would allow the difference between the amount for which the said small mule sold, and one hundred and twenty-five dollars. The small mule was sold by Wooten, the defendant, for \$110.00. That after that time the defendant (Wooten) took possession of the said mouse-colored mule mentioned in the suit." There was no material conflict in the testimony as to the terms on which the exchange was effected, the evidence adduced in behalf of the defendant tending to corroborate the foregoing witness. The plaintiff requested the court, in writing, to charge the jury as follows: "If the jury believe from the evidence that Bill McMillan was authorized by James J. McMillan to trade the little black mule, and he did trade him to the defendant for the mouse-colored mule, that the legal title to the mouse-colored mule was invested in the plaintiff; and if the evidence further shows that the defendant converted said mule, they should find for the plaintiff." To the refusal of the court to charge as requested the plaintiff duly excepted, and here assigns the same as error.

J. W. BUSH, for appellant.

WATTS & SON, *contra*.

SOMERVILLE, J.—The action, being trover, can be maintained in this case only on the theory, that the plaintiff was invested with the ownership of the mule alleged to have been converted to the use of the defendant.

Whether he had acquired any property in the animal depends upon one of two contingencies. The agent of the

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plaintiff, who made the exchange of the small black mule owned by the plaintiff, for the mule owned by Wooten—the one here in controversy—must either have been invested with the original authority to make the exchange, or else the transaction must have been subsequently ratified by the plaintiff, under such circumstances as to be binding on him.

The agent, McMillan, testifies that the plaintiff “authorized him to trade off said [black] mule if he could get anything that suited him.” This authority, in our opinion, conferred on the agent the power only to make a barter or exchange on equal terms—so that the thing given and that received should be equivalent each for the other. It did not confer any power to trade by way of purchase in such manner as to burden the plaintiff with an accompanying obligation to pay in money the difference in value between the two animals. The latter trade is the one shown to have been made by the agent, and not the former. It created a debt which was not binding on the principal without his ratification, express or implied. The charge requested erroneously assumes the contrary to be true, and was for this reason properly refused.

Affirmed.

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Bill in Equity by Distributees to Charge Sureties on Administrator's Bond.

1. *Balance decreed against administrator on first settlement, who resigns and becomes his own successor; distributees may charge sureties on either the first or second bond.*—When an administrator, having resigned, afterwards becomes his own successor, and a balance is decreed against him on settlement of the first administration, the distributees may, at their election, charge the sureties on either the first or the second bond.

2. *Representation of infant distributee on final settlement of guardian ad litem.*—When an infant distributee is represented, on final settlement of an administrator's accounts, by a guardian *ad litem* regularly appointed, the decree is as binding on him as if he were an adult.

3. *Final settlement of administrator's accounts; when an estate not ready for settlement and distribution, decree must be rendered against him in favor of the succeeding administrator de bonis non.*—On final settlement of an administrator's accounts, when the estate is not ready for settlement and distribution, a decree against him must be rendered in favor of the succeeding administrator *de bonis non* (Code, § 2595); and if he has been appointed his own successor, the probate court has, ordinarily, no jurisdiction to make the settlement.

4. *Settlement by administrator, who is his own successor, of both administrations, &c.; when sureties on first bond can not be charged.*—If the

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administrator is summoned to settle both administrations on the same day, and a balance is first ascertained against him on the statements of the accounts of the first administration, which, at the instance of the distributees, is carried as a debt into the second, they can not afterwards, by bill in equity, charge the sureties on the first bond with the amount of this balance, on the ground that the court, by reason of the antagonistic positions occupied by the administrator, had no jurisdiction of the first settlement.

APPEAL from the Chancery Court of Perry.

Heard before Hon. THOMAS COBBS.

PETTUS & DAWSON, and BROOKS & ROY, for appellants.

JAMES E. WEBB, *contra*.

STONE, C. J.—W. B. Modawell was appointed administrator *de bonis non* of the estate of Richard H. Hudson in 1865, and gave bond, with Elijah Steele, Robert L. Steele and S. S. King as his sureties. He entered upon the administration. On the 13th day of February, 1871, he resigned his said administration, leaving part of the assets not reduced to money, nor in form for distribution, and leaving some of the liabilities of the estate unpaid. On the 15th day of February, 1871, he was again appointed administrator of said estate, and gave another bond, with different sureties. After his second appointment, he proceeded to complete the administration, by collecting up the unpaid dues, and paying the unpaid debts. Of the dues collected during the second administration, there appears to have been about the sum of thirteen hundred and seventy-six dollars, at the time the several collections were made; and the principal of the sums he disbursed during the second administration was about the sum of one thousand and sixteen dollars. It is thus seen, that, at the time he resigned the first administration, the estate was not fully administered, and the administration was not ready for final and complete settlement, so as to dispense with the necessity of administration *de bonis non*.

In 1877 the said W. B. Modawell, being cited thereto, filed his accounts current in the probate court for a final settlement of the two administrations—the settlements to be made separately, though set for the same day. Regular continuances were had, from time to time, until May, 1878, when the two settlements were made—that of the first administration being first considered and disposed of. No irregularity is shown in either of these settlements, except that complainants in this suit and cross-suit contend that, because Modawell was his own successor, the probate court was without jurisdiction to conduct the settlement of the first administration. The dis-

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tributees had notice, and were properly represented on this settlement; and it is shown that the administrator was charged to the full extent of his liability. Nothing was lost to the distributees, which skill and diligence could charge the administrator with, as is shown by this record. The result of the account taken in the settlement of the first administration was, that a balance of over nineteen thousand dollars was found against him, as of date February 13, 1871.

The settlement of the second administration was then entered upon. The administrator, at the conclusion of the first settlement, had moved the court that order of distribution be then made, distributing the sum found due at the close of the first administration. This was successfully resisted by the distributees, and the ascertained balance was carried forward as a debit into the second settlement. The second settlement was then made, and a distribution ordered of the entire unadministered assets of the two administrations, and decrees were rendered therefor in the settlement of the second administration. This was in May, 1878.

The bill in this cause was filed in January, 1882, and seeks to fasten a liability on the sureties given in the first administration, for the default ascertained in the settlement of that administration. The sureties on the first bond pleaded the probate decrees of distribution, noted above, in bar of the present suit. The chancellor overruled the plea, and granted the relief prayed by complainants.

The equitable ground claimed in the bill is, that because, when Modawell resigned his first administration, the estate was not fully administered, and was not ready for settlement, any decree of final settlement, rendered in the close of that administration, must have been rendered in favor of the administrator *de bonis non*, and could not be rightfully rendered in favor of the distributees. The following authorities are relied on in support of this view.—Code of 1876, § 2955; *Waring v. Lewis*, 53 Ala. 615, 628; *Glenn v. Billingslea*, 64 Ala. 345; *Hatchett v. Billingslea*, 65 Ala. 16; *Martin v. Ellerbe*, 70 Ala. 326. In the second place, it is contended that Modawell being his own successor—filling the place of him in whose favor the decree should be rendered—that this presented no possible antagonism of parties—that there could be no decree rendered in favor of Modawell, administrator, against himself, either in a personal or fiduciary capacity, and that therefore the probate court was without jurisdiction to make the settlement.—*Hays v. Cockrell*, 41 Ala. 71; *Griffin v. Pringle*, 56 Ala. 486; *Tankersly v. Pettus*, 61 Ala. 354; *Ex parte Lyon*, 60 Ala. 650; *Alexander v. Alexander*, 70 Ala. 212; *Clark v. Head*, 75 Ala. 373. From these premises, which must, as a

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general rule, be conceded to be sound, it is claimed that the probate court had no jurisdiction of the settlement of the first administration, and that that attempted settlement must be treated as a nullity. On this postulate it is claimed that the present bill must be treated as one by distributees to bring an administrator to a settlement in the Chancery Court, with no precedent or proceedings therefor in the probate court to oust its jurisdiction.

There can be no question that the probate court had jurisdiction to preside and decree in the settlement of the second administration; and that the decree rendered on that settlement is as binding, as full jurisdiction regularly exercised, can make it.—*Alexander v. Alexander*, 70 Ala. 357; *Vincent v. Martin*, 79 Ala. 540. And it is settled beyond all peradventure by the rulings of this court, that circumstanced as these complainants were, they were armed with the option and election of fastening the default on the first administration, during which it was committed, or on the second, for negligence in the administrator, in not bringing the funds within its administrative control.—*Whitworth v. Oliver*, 39 Ala. 286; *Steele v. Graves*, 68 Ala. 17; *Willis v. Willis*, 16 Ala. 652; *Sewell v. Buckley*, 54 Ala. 592; *Modawell v. Hudson*, 57 Ala. 75. And the fact that Alice Hudson was at the time a minor can make no difference. She was represented by a guardian *ad litem* duly appointed, who, with his counsel, contested every step taken in each of the settlements. The decree is as binding on her as if she had been an adult.—*Otis v. Dargan*, 53 Ala. 178; *Waring v. Lewis*, *Ib.* 615; *Hutton v. Williams*, 60 Ala. 133; *Hatchett v. Blanton*, 72 Ala. 423. It is not claimed in the present bill that a greater liability rests on Modawell, than was ascertained and decreed against him in the probate settlement.

It is contended, as we have said above, that the probate court was without jurisdiction to preside in the settlement of the first administration, because the statute requires that when there is a succeeding administrator, the decree must be rendered in his favor.—(Code, § 2595)—and Modawell being his own successor, no decree could be rendered in his favor against himself. This provision of the statute is, by its own terms, mandatory only when the estate can not be finally closed on such settlement. When the settlements were made, May, 1878, the estate was in condition to be finally closed, for no act of administration remained to be done, except to make the settlement. If, under the facts shown in this record, there had been a final decree, and distribution ordered at the close of the settlement of the administration, it is difficult to perceive or to formulate an argument to show, that such decree would not be

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binding on all parties affected by it, and irreversible at the suit of any or either of them. We need not decide this.

In making settlement of the second administration there was no want of jurisdiction in the probate court. The distributees, as we have shown, had the option and right to bring the deficit in the first administration, as debit into the settlement of the second. It was so brought in and decreed, and the bill in this case does not deny that the just and full amount of default was so brought in and allowed against the administrator. It would perhaps be enough if the distributees stood silently by, and permitted this to be done.—*Mims v. Norris*, 58 Ala. 202; *Vincent v. Martin*, 79 Ala. 540. They did more in this case. It was at their instance this default was brought forward and decreed in the settlement. Having thus elected to fasten the liability on the second administration, and the sureties on the second bond, can they be allowed to retrace their steps, and fix the default on the first set of sureties? And having, in the exercise of an undoubted option and right, obtained a strictly lawful decree binding on the second sureties, which no court would or could reverse, will the complainants be now allowed to obtain another decree, for the same default, and in the same amount, against the sureties on the first bond, whose exoneration had necessarily been decreed by the election to charge the second sureties, carried into a valid and binding decree against them? Suppose this suit was by the sureties on the second administration bond, claiming that the default committed during the first administration should be lifted from their shoulders, and decreed against the bondsmen of the first administration; and suppose the same facts were presented as are shown in this record; would it be contended that a bill seeking such relief contained equity?

We have said the complaint in this case does not pretend that the true and full amount of Modawell's default was not ascertained and decreed against him. The present bill claims nothing additional. Its sole purpose is to fix the greater part of the liability on other and different parties. If it were charged and shown that there was a larger default than that ascertained in the probate court, then it would be necessary to inquire whether that court had jurisdiction to conduct the settlement of the first administration.—*Vincent v. Martin*, *supra*. The probate court having unquestioned jurisdiction of the settlement of the second administration, and the election of the distributees to carry the default of the first as a debit into the second administration, rendering it necessary to ascertain the extent of that default, it was immaterial how that important fact was arrived at, provided it was correctly done. The decrees of distribution being in all respects regular and for the

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proper sums, the fact that by irregular processes, if you please, the account was taken—correctly taken—without invoking the powers of the Chancery Court, can give the present complainants no right to maintain this bill. Their opportunity was to claim or accept distribution, when the true account of the first administration was ascertained in the probate court, or, if necessary, to have sought relief in the Chancery Court, before electing or allowing that balance to become absorbed and decreed in the second administration.

Neither the original nor cross-bill makes a case for relief. The decree of the chancellor is reversed, and a decree here rendered, dismissing both the original and cross-bills, at the cost of the several complainants therein.

Reversed and rendered.

Gladden *et al.* v. The American Mortgage Co.

Bill in Equity to Foreclose Mortgage.

1. *When summons properly served on wife.*—When husband and wife are joined as defendants to a bill, the summons for the wife is properly served, not on her personally, but on the husband for her (Rule of Ch. Pr., No. 22), unless the suit relates to her separate estate, or unless they are living apart; and the presumption will be indulged, when the contrary is not affirmatively shown, that they are living together.

2. *Decree pro confesso not amendable on chancellor's bench notes, nunc pro tunc.*—A decree *pro confesso*, in regular form against husband and wife, can not be amended *nunc pro tunc*, so as to omit the name of the wife, on proof of the chancellor's "bench notes" ordering a decree against the husband, but not naming the wife.

3. *Mortgaged lands decreed to be sold; when reference to register not necessary.*—In decreeing the foreclosure of a mortgage, it is not necessary to first order a reference to the register to report how much and what part of the mortgaged lands shall be sold; it is sufficient if the decree directs the register to sell only so much as may be necessary to satisfy the decree, and such part as can be sold with least injury to the defendant.

APPEAL from Calhoun Chancery Court.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed by the American Mortgage Company, of Scotland, limited, of Edinburg, incorporated under the laws of Scotland, and doing business in Alabama, against the appellants, James A. Gladden and his wife, Martha Gladden, and prayed for the foreclosure of a mortgage executed to complainants by Gladden and wife, upon certain

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lands therein described, belonging to the said James A. Gladden. The original return of the sheriff on the *subpoena* for the defendants was as follows: "Executed by handing the defendants, James A. Gladden and Martha Gladden a copy of the within on the 7th day of September, 1885." On the 12th October following a decree *pro confesso* was taken against both of the defendants, as shown by the minutes of the court; and, at the same term, a decree was entered referring the cause to the register to ascertain and report the amount due the complainants on the mortgage debt. At a subsequent term, April, 1886, a motion was made by the defendant, Martha Gladden, to amend the record, *nunc pro tunc*, by striking from the decree *pro confesso* taken October 12th, 1885, the name of said Martha Gladden, because she had never been served with a *subpoena* or other summons as required by law, averring that she had a good and valid defense to the cause of action stated in the bill. At the said April term, 1886, motion was made by the sheriff to amend his original return, so as to make it as follows: "Executed by handing the defendant James A. Gladden a copy of the within, and also a copy of the same to be handed to Mrs. Martha Gladden, on the 7th day of September, 1885." A motion was also submitted by the defendants asking that it be referred to the register to ascertain the value of the mortgaged lands, and report whether it was necessary to sell all, or what portion of the same, to satisfy complainant's decree. The cause being submitted for final decree on pleadings and proof, a decree was rendered in favor of the complainant for the amount of the mortgage debt found to be due, and, in default of payment, directing the sale of so much of the mortgaged lands as should be necessary to pay said debt and costs. From this decree the defendants appeal, and assign as error—1. The action of the court in overruling the motion of Martha Gladden to amend the record, striking her name from the record of the decree *pro confesso*. 2. In refusing to set aside said decree as to Martha Gladden. 3. In refusing the motion of reference to the register to ascertain and report whether it would be necessary to sell all of the mortgaged lands. 4. In rendering the decree *pro confesso* against Martha Gladden. 5. In rendering the final decree.

PARSONS, PEARCE & KELLY, and CALDWELL & CALDWELL, for appellants, cited *Tanner v. Hayes*, 47 Ala. 724; *Caffey v. Wilson & Gunter*, 2 Ala. 701; 9 Porter, 252; Freeman on Judgments, § 56; *Harris v. Billingsley*, 18 Ala. 438; *Farmer v. Wilson*, 34 Ala. 75; *Young v. Brockson*, 23 Ala. 684; *Glass v. Glass*, 24 Ala. 468. There is an irreconcilable conflict between section 3764 of the Code and the Rule of Practice 22.

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The statute *requires personal service*; the Rule of Practice *ignores* personal service. Rules of Practice must be based upon and authorized by the statute.—77 Ala. 381; 72 Ala. 49.

ELLIS & STEVENSON, *contra*. No brief on file.

SOMERVILLE, J.—It is contended that the decree of the chancellor in this case should be reversed, among other reasons, because it is based on a decree *pro confesso* taken without proper service on Mrs. Gladden, who is a married woman, and one of the defendants to the bill, her husband being the sole remaining co-defendant.

The amended return of the sheriff shows that the summons or *subpoena* was served upon the husband for the wife, and not personally upon the latter. This is in precise accordance with Rule No. 22 of Chancery Practice, which provides that “married women may be made defendants by service of summons to answer upon their husbands, if residents and living together; if living apart, by personal service on each;” except where the separate estate of the wife is the object of the bill, and then the summons is required to be served on her personally.—Code, 1876, pp. 164–5. This rule is, in substance, the same as that which long prevailed under the English system of equity practice.—1 Dan. Ch. Pr. 445. It does not conflict with the provisions of the statute as embodied in sections 3763–64 of the present Code of 1876, which have reference to service upon other defendants than married women. The present suit has no relation to the wife’s separate estate. The property conveyed by the mortgage sought to be foreclosed is the property of the husband, the only interest of the wife in it being a mere inchoate or contingent right of dower. The recitals of the mortgage, which is an exhibit to the bill, sufficiently show by admission the relationship of the defendants as husband and wife, and their residence in the State, without further proof of these facts. And while the service on the husband is authorized only when the husband and wife are residents and live together, the presumption is that they did live together and not apart, as marital duty, both moral and legal, harmonizing with general custom, would naturally dictate. We can not assume the contrary for the purpose of reversing the decree.

The record shows a regular decree *pro confesso* taken in due form against both of the defendants. This record can not be changed or dominated by the “bench-notes” of the chancellor, which show an order for such decree only against James A. Gladden, the husband. They are mere memoranda, which can not prevail against the more solemn and regular recitals of the amplified record. The motion to amend the decree *nunc pro*

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tunc based on this evidence was properly overruled. If it had been sustained its legal effect would have been to strike out of a final decree, after adjournment of the court rendering it, the name of a material defendant, thus entirely annulling the force of the decree against a party whose rights had been adjudged after her day in court. This can not be done.

The chancellor properly refused to delay the cause by referring it to the register to report how much and what part of the mortgaged land should be sold to satisfy the mortgage debt. He pursued the usual and proper practice in directing the register to sell only so much of the land as was necessary to satisfy the decree, and which could be sold with least injury to the defendants. This was all the defendants had a right to ask, and dealt exact justice to all parties.

We discover no error in the record, and the decree is affirmed.

Western Union Telegraph Co. v. State Board of Assessment.

Certiorari to Board of Assessors, in Matter of Tax Assessment Against Telegraph Company.

1. *Constitutional provisions regulating taxation on property.*—The constitutional provisions which declare that “all taxes levied on property shall be assessed in exact proportion to the value of such property,” and inhibit the levy of “a greater rate of taxation than three-fourths of one per centum on the value of taxable property within this State,” (Art. XI, §§ 1, 4), prescribe a rule and limit of taxation on property, but do not include all the legitimate subjects of taxation, some of which are not susceptible of determinate value.

2. *Tax on gross receipts from business of telegraph companies; constitutionality and extent of.*—The tax of two per cent. levied on the gross amount of the receipts of every telegraph company, “derived from business done by it in this State” (Sess. Acts 1884-5, p. 10, § 6, subd. 6), is not violative of any constitutional provision regulating taxation; nor is it an unauthorized interference with inter-state commerce, although it includes receipts here on messages sent to or from places beyond the limits of the State.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

The appellant in this case, a foreign corporation, organized under the laws of New York, and doing business in this State, complaining of the taxes assessed against it by the State Board of Assessment, for and during the year, 1884, filed its petition for a *certiorari* to remove the proceedings into the Circuit

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Court, asking that they be set aside and quashed, as being illegal, unauthorized and void. On motion of the defendants, by their attorney, the court dismissed the petition and *certiorari*, holding the proceedings legal and regular; and this judgment, to which the petitioner excepted, is now assigned as error.

(No brief of appellant came into hand of reporter).

GAYLORD B. CLARK, and THOS. G. JONES, for appellant.

CLOPTON, J.—Subdivision six of section six of the Revenue Law levies a tax of two *per centum* “on the gross amount of the receipts by any and every telegraph, telephone, electric light, and express company, derived from business done by it in this State.” Acts, 1884–85, p. 10. The constitutionality of the statute is the material point of contestation; which question we shall consider on account of its importance to both the State and the tax-payer, pretermittting any expression of opinion as to the appropriateness or regularity of the proceedings. Appellant contends the statute violates section one of article eleven of the Constitution, which requires that “all taxes levied on property in this State shall be assessed in exact proportion to the value of such property;” and also, section four of the same article, which provides, “The General Assembly shall not have the power to levy, in any one year, a greater rate of taxation than three-fourths of one *per centum* on the value of taxable property within this State.”

Prior to the Constitution of 1865, the only limitations on the power of taxation were, that no one shall be obliged to pay any tithes, taxes, or other rate, for the building or repairing of any place of worship, or for the maintenance of any minister or ministry; that no power to levy taxes shall be delegated to individuals or private corporations; and taxes shall not be levied for their benefit, without the consent of the tax-payer. The *ad valorem* rule was first introduced, and then only applicable to real property, in the Constitution of 1865, by the mandate, “All lands liable to taxation in this State shall be taxed in proportion to their value.” On personal property taxes could be imposed as the legislature might consider most expedient. The rule was extended, and its application enlarged in the Constitution of 1868, by incorporating therein an article providing, “All taxes, levied on property in this State, shall be assessed in exact proportion to the value of such property;” and also a prohibition that the General Assembly shall not have power to authorize any municipal corporation “to levy a tax on real and personal property to a greater extent than two *per centum* of the assessed value of such property.” The pro-

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vision of the Constitution of 1868, first quoted, entered *in totidem verbis* into the present constitution, with a super-added prohibition as to the rate of taxation to be levied by the General Assembly; and the rate authorized by municipal corporations was reduced. There are other provisions relating to taxation in the two later constitutions, which it is unnecessary to note, as they have no material bearing on the question under consideration.

Having been taught by experience that no legislative power is more liable to oppressive use than the taxing power, and having suffered evils by resting it too broadly on discretion, the people have shown, in the history of the successive constitutions, a progressive policy to restrain the power of the legislative department in this respect, and to remedy existing, and guard against apprehended evils, by imposing limitations consistent with the public needs and the public safety. The just expositor, in interpreting the constitutional mandates and inhibitions, will consult the changes, that have been made from time to time, the causes which produced them, and the mischief intended to be remedied. The words used should be allowed such operation and force, as will reasonably accomplish the purposes proposed, but without extension beyond their legitimate meaning, and so as to avoid embarrassing and disabling proper governmental administration. Thus considered and interpreted, do the provisions of the Constitution apply to every subject of taxation, to which resort is usually, and may be legitimately made, to raise money for public purposes and needs? or only to direct taxation on property as such, by prohibiting an arbitrary, specific standard, and requiring assessment in proportion to its value? Was it intended to limit the subjects of taxation, or only to prescribe the mode of assessing the taxes when levied on a particular subject?

Fortunately we are not without aid in interpreting these provisions. Substantially similar provisions were contained in the constitutions of some of the other States, which had received judicial construction, prior to their incorporation in either of our constitutions. The constitutions of California, Texas, Virginia, Louisiana, Illinois, Ohio and other States, contain similar or equivalent provisions, which had been construed, not to prescribe a limit as to the subjects of taxation, but as intended to prohibit an arbitrary taxation of property, as to kind or quality, without regard to value.—*People v. Coleman*, 4 Cal. 46; *Eyre v. Jacob*, 14 Gratt. 422; *Sawyers v. City of Alton*, 3 Scam. 127; *Aulanier v. Governor*, I. Tex. 653; *Baker v. Cincinnati*, II. Ohio St. 534. In *Aulanier v. Governor*, *supra*, it is said: "The word *property*, as used in the Constitution, can not, by any forced construction, be

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tortured into meaning an occupation, calling, or profession." In *Glasgow v. Rowse*, 43 Mo. 479; WAGNER, J., says: "That taxes should be uniform, and levied in proportion to the value of the property to be taxed, is so manifestly just, that it commends itself to universal assent. But, notwithstanding the constitutional provision, there are some kinds of taxes that are not usually assessed according to the value of property, and some which could not be thus assessed; and there is, perhaps, not a State in this Union, though many of them have in substance the same constitutional provision, which does not levy other taxes than those imposed on property. * * * It therefore seems plain, that the constitutional requirement, that 'taxation upon property shall be in proportion to its value,' does not include every species of taxation; nor, indeed, would it be possible to place such an interpretation upon it without doing the grossest injustice." In *Burroughs on Taxation*, § 54, referring to such limitations, the author observes: "These provisions, as a general rule, are held to apply to property alone, and not to include taxation on privileges or occupations, or upon the exercise of a civil right, as taking by devise or descent."—Cooley's Con. Lim. 619; *Western U. Tel. Co. v. Mayer*, 28 Ohio St. 521; *State v. Western U. Tel. Co.*, 63 Me. 518.

It is conceded that the word *property* is sometimes employed in the revenue laws in its comprehensive sense, and as synonymous with *subjects*; and will be so construed, when required by the context, or when the manifest purpose of the law will be otherwise defeated. Such is the case of *Lehman, Durr & Co. v. Robinson*, 59 Ala. 319. Being used in more than one sense, the inquiry is, in what meaning is it employed in respect to the levying of taxes? If there be nothing showing a different intention, words ordinarily are to be taken in their usual and familiar import; and when general and continuous usage in legislation respecting a particular subject-matter has imparted a particular meaning, subsequent use of the same word in legislation relating to the same subject-matter creates a reasonable inference that it was intended to be employed in the same sense, there being nothing in the context showing a different intention. Taxes are not levied upon the *right* a man may have to anything—the right of possession, use, enjoyment, and disposition, which is property, taken in its legal and technical signification; but upon the subject of these rights. Therefore, in specifying the subjects, generally, an obvious distinction is recognized and maintained between property taxed as such, and the other subjects of taxation. In *Lott v. Rose*, 38 Ala. 156, the question was, whether the authority conferred on the county of Mobile to assess and collect a tax, not exceeding twenty

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cents on each hundred dollars of taxable property within the county, conferred a power to levy a tax of twenty cents upon each hundred dollars of the gross amount of the sales of merchandise. The authority was claimed on the ground, that the State revenue law assessed a tax on the gross amount of sales of merchandise, thereby constituting such sales taxable property. It was held, that every subject of taxation, under the State laws, can not be considered as embraced by the terms "taxable property" employed in the special act; and that in various sections of the general revenue law, the distinction between *property* made liable to taxes, and other subjects of taxation, is clearly drawn. It is said: "A tax upon the gross amount of sales of merchandise, under section 391 of the Code, is not a tax upon the goods themselves, or the fruits of the sale, but upon the business of the act of selling. This is not, then, a property or income tax, but an occupation or privilege tax, the amount being regulated by the extent to which the privilege has been enjoyed." *Property*, when employed in connection with the assessment and levy of taxes, had thus received a judicial interpretation, which, we must presume, was in the contemplation of the framers of the organic law.

Not only were the provisions of the Constitution adopted in view of the judicial construction placed upon the meaning of "property," as used in the revenue laws several years previously, but the special matter of consideration was the necessity and expediency of restraining the power to tax, as conferred by the general grant of legislative power. The convention was advised that, independent of special restrictions, the taxing power extends to "person, or property, or possession, franchise or privilege, or occupation or right;" and reaches every source of revenue and subject of taxation within the jurisdiction of the State, only limited by public purposes, and only restrained by the protection guaranteed to private rights against oppression; and that all these sources and subjects of taxation had been and were resorted to. Property always had been and was the main reliance for raising revenue. The apprehended evils and dangers of oppressive and arbitrary taxation were especially directed to this subject—property, tangible and visible, capable of being reached, and easily confiscated. The *desideratum* was the protection of the property of the citizen against forced contributions or legislative plunder. Assessment in exact proportion to value is the mode and means of protection, with an added limitation on the rate of taxation. Hence, the limitation in the Constitution of 1868, from lands to property as embracing the subjects of ownership, whether real or personal; and the same clause is brought into the present Constitution without any modification or change. With a knowledge

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of the various subjects of taxation ; of the well-defined distinction between property, when made liable to taxes, and other subjects of taxation ; and that among such other subjects were occupations, privileges, business, and licenses, which in the nature of things are incapable of determinate value, valuation was adopted as the basis and measure of assessment. The limitations, by their terms, signify an intention that the provisions shall be only applicable to property, the value of which is capable of definite ascertainment by the officer whose duty it is to make the assessment ; and that all other subjects of taxation should be excluded from their operation. The language is : "All taxes levied on *property* in this State, shall be assessed in exact proportion to the value of *such property*." The terms are restricted to property, as a species of the *genus*, "subjects of taxation." The context shows, that the word is employed in its usual and ordinary meaning, designating the thing owned, in the same sense in which it was generally used in the sections of the revenue laws, relating to the assessment and levy of taxes. The legal and logical sequence of the position of appellant would be, that the limitations operate to prohibit the levy of taxes on any subject, not susceptible of determinate value.

It is contended, that if the word "property," as used in section one of article eleven, be construed as not synonymous with "subjects of taxation," the terms "taxable property," as used in section four of the same article, include any subject which can be taxed ; and that the section forbids a greater rate of taxation on any subject than three-fourths of one *per cent*. If the terms of the section had been general,—prohibiting a greater rate on *any taxable property*,—without qualifying words, there would have been much force in the argument of counsel. But here, also, we find valuation constituting the basis on which the prohibition as to the rate rests, and by which it is determined. In *Lott v. Rose, supra*, these words were construed. It is said : "Where the words 'taxable property' occur in an independent act, it would seem that they should be understood in the sense of things taxed which are susceptible of ownership or possession, unless there is something in the context which affixes to them a different meaning, or unless the plain object of the law will be defeated, if they are not held to cover subjects of taxation which are not property in the ordinary sense." If so construed when employed in an independent act, *a fortiori*, such should be the construction when used in a section composing, with others, the article of the Constitution relating to the subject of Taxation, all the sections of which, being *in pari materia*, should be construed together. The framers of the present Constitution, experiencing that the limitation in

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the one preceding, requiring taxes levied on property to be assessed in proportion to value, was ineffectual to prevent oppressive taxation, connected therewith a prohibition as to the rate of taxation on such valuation.

It may be considered that the gross receipts from business are property, in its strict meaning. In such sense it was undoubtedly employed in the majority opinion in *State Freight Tax*, 15 Wall. 284; the authority of which is weakened by the dissenting opinion, in which it was said, that the tax on gross receipts of railroad companies is a tax for the privilege of transportation. In *Lott v. Rose, supra*, it was held that a tax on the gross amount of sales of merchandise, which are gross receipts, is not a property or income tax, but an occupation or privilege tax, the amount regulated by the extent of the business done. In *Board of Revenue v. Gas Light Co.*, 64 Ala. 269, and in *State v. Board of Revenue*, 73 Ala. 65, the tax was imposed on the net income, and not on the business. The money, held and owned by the company, as the net result of the business, was the subject of taxation. An income tax stands on different principles; its value is determinable; and the rules governing such tax are inapplicable to a tax on gross receipts. One of the recognized modes of taxing business is a tax on gross receipts, which generally are not regarded as property for taxing purposes.—*State v. P. W. & B. R. R. Co.*, 45 Md. 361; *Phil. Con. Ins. v. Commonwealth*, 98 Penn. St. 48; *Sacramento v. Crocker*, 16 Cal. 120; *Warring v. Savannah*, 60 Ga. 99; *Winby v. Girardy*, 31 La. Ann. 382. *Taxable*, as used in the fourth section, qualifies and designates property, not which it may be in the power of the legislature to make liable, but which is made liable, to taxation. The value of such property must be determined, before it can be ascertained that the rate of taxation imposed exceeds the rate limited by the Constitution. By what measure or *criteria* can the business be ascertained, which so largely depends upon the vigilance, energy and skill exercised in its prosecution? The gross receipts constitute no measure of value, for they may be large, and yet the business be valueless, by reason of losses, misfortune or mismanagement. Business, though made a subject of taxation, not being capable of determinate value, is not taxable property, in the meaning of the terms employed in the constitutional limitation of the rate of taxation.

It is further insisted, that the section of the Revenue Law under consideration is violative of the Constitution, in that the rule of equality and uniformity is disregarded, by putting an arbitrary value on the gross receipts of telegraph companies, and a different value on the gross receipts of other kinds of companies. The proposition, as stated in the argument of

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counsel, is, "when income or gross receipts are taxed, everybody that is taxed in this State must be taxed alike." The fallacy of the proposition consists in the assumption, that the tax on gross receipts is levied by a standard of valuation, instead of by the character and extent of the business. Whilst there is no provision of the Constitution, commanding in terms equality and uniformity, the principle should underlie and regulate the provisions of every law imposing public burdens and charges. It is not controverted, that the taxing power may select the subjects of taxation, and constitutionally classify them. Taxes should be imposed on any subject, in just proportion to the benefits and protection which such subject receives more than other subjects of taxation. The rule of uniformity does not require that all subjects be taxed, nor taxed alike. The requirement is complied with, when the tax is levied equally and uniformly on all subjects of the same class and kind. It extends to the class upon which the tax shall operate. Different occupations may be taxed at different rates, and some may be altogether exempted; and the requirement of uniformity is not infringed, if the various classifications include all occupations similarly circumstanced and of the same kind.—*Moog v. Randolph*, 77 Ala. 597; *State Railroad Tax Cases*, 92 U. S. 575; *Worth v. Wil. & Wel. R. R. Co.*, 15 Am. & Eng. R. R. Cas. 286; *County of San Mateo v. So. Pac. R. R. Co.*, 8 Am. & Eng. R. R. Cas. 1; *Cooley on Taxation*, 170. The tax complained of may be onerous, and apparently unequal with the tax levied on the business of other corporations or companies. This is a matter submitted to the discretion and judgment of the legislature, and their action must be regarded as conclusive. The courts can not interfere, unless an illegal or unauthorized exaction is attempted.

A construction which limits the tax to gross receipts derived from business done between points, both of which are within the territorial limits of the State, is more restrictive than the words and purpose of the statute import. The legislature knew that the appellant company operated extensive telegraph lines from places beyond, into, and through the State, and intended to make the tax commensurate with the benefits and protection received from the government. Receiving messages at offices located in the State, for transmission, and transmitting them without, is business done in this State, though the service may not be complete until the delivery to the sendee at some place beyond its boundaries. The statute does not purport to tax gross receipts not collected in Alabama, but, by fair interpretation, includes all receipts derived from business done in this State, and actually received here, though the message may have to be delivered at, or may be sent for delivery

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from, some office without the jurisdiction of the State. Though thus construed, the statute is not an unauthorized interference with inter-State commerce. This question is fully and ably considered and discussed in the following cases: *Western U. Tel. Co. v. Richmond*, 26 Gratt. 1; *Western U. Tel. Co. v. State*, 55 Texas, 314; *Western U. Tel. Co. v. Mayer*, 28 Ohio St., *supra*; *Port of Mobile v. Leloup*, 76 Ala. 401, and is expressly decided in respect to a tax on the gross receipts of railroad companies, though consisting in part of freights received for transportation of merchandise from the State to another State, or into the State from another, in *State Freight Tax Cases*, 15 Wall. 284; *Osborne v. Mobile*, 16 Wall. 479. Further discussion would be superfluous.

Affirmed.

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Bill in Equity to Establish Lien, and Subject Property to Debt of Partnership Creditors.

1. *Declarations of husband acting as agent of wife.*—When the husband, acting as agent of the wife, makes declarations in regard to a partnership business, in which she is a member, such declarations or admissions being narrative only of a past transaction, are not legal evidence to fix a charge on her, or her estate.

2. *Husband's power over wife's statutory estate.*—The statutory separate estate of the wife can not be bound by any act of the husband, except to the extent of the statute making it liable for "articles of comfort and support of the household &c." § 2711, Code.

APPEAL from Tuscaloosa Chancery Court.

Heard before the Hon. THOMAS COBBS.

This bill was filed by John H. Ward and James W. Ward, against Elizabeth Johnson and her husband, Nelson D. Johnson; and was commenced Feb. 2d, 1883. The bill alleges that complainants entered into a partnership with the defendant, Elizabeth Johnson, on 3d January, 1881, for carrying on a general merchandise business at Coaling Station on the Alabama Great Southern Railroad in Tuscaloosa county; that said Elizabeth Johnson was to furnish the store house and premises for carrying on the business, and complainants were to furnish a cash capital of one thousand dollars; that the business was to be conducted in the partnership name of J. H. Ward & Co., each partner to be equally interested in the bus-

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iness. The bill charges that N. D. Johnson, husband of Elizabeth Johnson, in violation of the terms of the partnership, applied the proceeds of the business to the construction of a tramway and purchase of an engine, by which diversion of its assets said partnership became insolvent; and prays that a lien upon said engine and the iron on said tramway be declared in favor of complainants for the reimbursement of complainants as members of said partnership. N. D. Johnson, as agent of his wife, operated a coal mine near Coaling Station, and dealt extensively with J. H. Ward & Co., purchasing supplies for the miners, &c., giving the employees tickets on said firm, which the said Johnson afterwards redeemed. During the continuance of the partnership a tramway was constructed from the mine to the Ala. Great Southern R. R. and an engine purchased for use on said tramway, which was claimed by J. H. Ward & Co. to have been done with funds of said partnership; but, is alleged by N. D. Johnson to have been done with funds belonging to his wife's separate statutory estate, and that the iron for the tramway and the engine were purchased in her name. The evidence was conflicting on this point. Upon final hearing, upon the pleadings and proof, the chancellor decreed that the complainants were not entitled to the relief prayed, and dismissed their bill. From this decree the complainants appeal.

VAN HOOSE & POWELL, for appellants.

WOOD & WOOD, McEACHIN & McEACHIN, A. C. HARGROVE, *contra*.

STONE, C. J.—We may concede that N. D. Johnson was the agent of his wife in conducting the partnership business, in which she appears to have been a member, and still the declarations he is alleged to have made afterwards, being only narrative of a past transaction, are not legal evidence to fix a charge on her, or on her estate. Her estate is statutory, and nothing her husband can say or do can bind it, except to the extent the statute makes it liable for “articles of comfort and support of the household” &c: Code of 1876 § 2711. *Chatham v. Newman*, 69 Ala. 547; *Lee v. Campbell*, 61 Ala. 12; *Gaus v. Williams*, 62 Ala. 41; *Lee v. Tannenbaum*, *Ib.* 501; *Carver v. Eads*, 65 Ala. 190; *Brunson v. Brooks*, 68 Ala. 248; *Ala. Gr. So. R. R. Co. v. Hawk*, 72 Ala. 112; *Lewis v. Lee County*, 73 Ala. 148; *Belmont Coal R. R. Co. v. Smith*, 74 Ala. 206.

Disallowing the testimony of Johnson's admissions, testified to have been made in the presence of Powell and others, we

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are not clearly convinced the chancellor erred in failing to find affirmatively that the money or merchandise of the partnership entered into the purchase of the iron or engine. *Nooe v. Garner*, 70 Ala. 443.

Mrs. Johnson owned a coal mine, her statutory separate estate, which was being mined, and the output sold. Her husband N. D. Johnson appears to have overlooked the mining, and settled with the laborers. It is inferable, rather than proved, that he superintended the sale of the coal. Whether the mine was operated on his own, or on his wife's account, is neither averred nor proved. Iron was purchased, and with it a tram-road was constructed on Mrs. Johnson's land, extending from the mine to the Alabama Great Southern railroad track, and an engine purchased to run upon it. The theory of the bill is that the money and merchandise of Ward & Co., co-partners with Mrs. Johnson, were used and consumed in paying laborers who mined the coal, and prepared it for market; and that with this coal and its proceeds the iron and engine were purchased and paid for. The purpose of the bill is to assert a lien on the iron and engine, for the payment of the debts of the firm of Ward & Co. We need not and do not decide whether the bill could be maintained, if its averments were proved. *Jones v. Dawson*, 19 Ala. 672; *Mulhall v. Williams*, 32 Ala. 489; *Ridley v. Hereford*, 66 Ala. 261; *Copeland v. Kehoe*, 67 Ala. 594; *Lee v. Winston*, 68 Ala. 402. With the limited power a married woman has over her statutory separate estate, it is a perilous undertaking to form a commercial partnership with her.

The decree of the chancellor must be affirmed.

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Ejectment by Municipal Trustees.

1. *Substitution of party plaintiff.*—When the plaintiff sues in an unofficial character, and his term of office expires by limitation of law before the termination of the suit, his successor may be substituted as plaintiff on motion; but, when a plaintiff makes a voluntary assignment *pendente lite*, his assignee does not become a necessary party.

2. *Constitutionality of laws abolishing city of Mobile and creating port of Mobile; by whom questioned.*—The constitutionality of the legislation abolishing the city of Mobile as a municipal corporation, and creating the port of Mobile its successor (Sess. Acts 1878-79, pp. 381-92; *Ib.* 1880-81, pp. 329-32), can not be assailed by a person who does not show that his rights or remedies as a creditor of the old corporation are

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thereby destroyed or impaired, or that he is otherwise in a position to be injured.

3. *Action by trustee, without sanction of court.*—Although trustees, when officers of the Chancery Court, may not have the right to institute an action at law without first obtaining the sanction of the court; yet it may be doubted whether the defendant can interpose this objection in defense of the action, and it certainly can not be raised for the first time in the appellate court.

4. *Taking private property for public use.*—The State itself can not, in the exercise of the right of eminent domain, take private property for public uses, without a regular judgment of condemnation in a proper judicial proceeding, first making payment of just compensation to the owner; nor can a municipal corporation dedicate private property to public use, by a mere ordinance so declaring, without the owner's acquiescence or consent.

5. *Dedication of street in city or town.*—A dedication of land for a street, in an incorporated city or town, must precede an acceptance by the corporate authorities; and a dedication will not be presumed from mere user for any period short of twenty years, when unaccompanied by any act on the part of the owner clearly showing his acquiescence; nor even after the expiration of twenty years when it is shown that the owner, during that period, contested or constantly interrupted the user.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This was an action of ejectment brought originally by Lorenzo M. Wilson, as trustee of certain bondholders, and John R. Simpson, as superintendent of wharves, against Hannibal Smith, Price Williams, Sr., and others, to recover possession of certain wharf property in the city of Mobile, fully described in the complaint. Pending the suit the term of office of John R. Simpson, as superintendent of wharves, expired; and, on motion, George B. Clitherall, his successor in office, was made a party plaintiff, against the objection of the defendants. M. P. Inge was also made a party plaintiff in place of Lorenzo M. Wilson, trustee, &c., who resigned.

On the trial of the cause, the plaintiff read in evidence the grants and deeds relied on in support of his title, and introduced as a witness Moses Waring, who testified that he had acted as the agent of the wharf owners in the sale of their wharves to the city of Mobile in 1870; that the premises sued for was land made by the owners of the adjoining lots and had never been condemned by the city authorities, nor had there been any dedication of it by the owners to public use, but that its use by the public, when used, was by permission of the adjoining property owners, who had in various instances obstructed its use by fences and by building brick attachments to their main buildings, which extended upon the premises, a part of which is here sued for. The plaintiff introduced as a witness L. M. Wilson, who testified that a part of the premises sued for was delivered to the commissioners of Mobile by the former authorities of said city, as provided for in the act for

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the settlement of the debts of said city, approved February 11, 1879, and that witness, as trustee, &c., had rented out a portion thereof to a tenant for a wood-yard.

The defendants offered to introduce in evidence a number of ordinances of the city of Mobile relating to maps, surveys, &c., all of which were prior in date to the act of February 11, 1879, vacating the charter of the city of Mobile, and creating the port of Mobile, to show that the premises sued for had been dedicated to public use. To the admission of this evidence the plaintiff objected, and the court sustained the objection; to which action of the court the defendants excepted.

Upon the evidence offered the plaintiff asked the written charge, that "if the jury believe the evidence they must find for the plaintiff;" which charge was given by the court, and the defendants excepted.

The appeal is taken by the defendants, who assign as error—
1. The admission of George B. Clitherall as party plaintiff. 2. The refusal of the court to allow defendants to offer in evidence the city ordinances, the official maps, &c., offered by the defendants on the trial. 3. The affirmative charge given.

JOHN R. TOMPKINS, and PILLANS, TORREY & HANAU, for appellant.

J. L. & G. L. SMITH, *contra*.

SOMERVILLE, J.—It is not contended that John R. Simpson, who was shown to sue in his official capacity as superintendent of wharves, was an improper plaintiff in the action, as originally instituted. The objection taken is to the ruling of the court by which his successor in office, George B. Clitherall, was allowed to be substituted as one of the plaintiffs of record, upon suggestion and proof that Simpson's official term had expired. This amendment, in our opinion, was entirely free from objection. Where the subject-matter of suit is assigned by operation of law, during the pendency of an action, the assignee of the title is always a necessary party, and may be substituted as a party on motion properly brought to the attention of the court. Common examples of this sort are found in cases of death, marriage, bankruptcy, and the like. The rule is the same, where the plaintiff sues in his official character, and his term expires by limitation of law. In such case, it is the officer that sues, and not the mere man who fills the office. Assignments of this kind, being made by law, are involuntary, and are distinguishable from those made by the voluntary act of the parties *pendente lite*. The latter do not become necessary parties, while the former do.—Barbour on Parties, 361;

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It is contended, however, that the acts of February 11, 1879, and of December 8, 1880,—including the whole system of legislation abolishing the charter and dissolving the municipal corporation of Mobile—are enactments which are void for repugnancy to the Constitution, because they impair the obligations of existing contracts, by destroying all remedies of creditors of the city for the enforcement of their demands. It is manifest that this objection can be raised only by some actual creditor whose rights are claimed to be invaded. The defendants in this case are not shown to be creditors, and as to them the enactments in question are entirely free from constitutional objections.—1 Dillon Munic. Corp. (3d Ed.) §§ 63-64; *Merriweather v. Garrett*, 102 U. S. 472, 511; Acts 1880-81, p. 329; Acts 1878-79, p. 381. Courts do not lend ear to objections urged against the constitutionality of statutes by parties whose rights are not affected, and who, therefore, possess no interest in having the court to pronounce upon the question.—Cooley's Const. Lim. (5th Ed.) 197 (*164).

Admitting the soundness of the suggestion, that the plaintiffs, being officers of the Chancery Court, had no authority to commence the action without previously obtaining the sanction of that court, it may be doubted whether the want of such sanction be an objection which the defendant could set up as a defense to the maintenance of the action.—1 Dan. Chan. Prac. (5th Ed.) *311, and *note* 5. However this may be, it is quite clear that the objection is one which can not be raised for the first time in this court.

We perceive no error in the rulings of the court refusing to admit in evidence the ordinances of the mayor and aldermen of Mobile, and of the maps of the city prepared under their authority. These were acts of the old municipality transpiring before its charter was vacated and its corporate existence dissolved, and before the creation of the existing corporation now known as the "port of Mobile," all of which legislation of the General Assembly was accomplished on February 11, 1879. Acts 1878-79, pp. 381, 392. These municipal ordinances relate to Front street in said city, and declare what shall be its dimensions and locality; and one or more of them authorize certain maps to be prepared by the city engineer, which are offered in evidence to show that the premises in controversy were a part of Front street as thus purporting to be dedicated to public use. If the city had at the time owned these premises, there might possibly be no tenable objection to this evidence. But such was not the case. The property was then owned by private persons, and the city had no lawful right to

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dedicate the property of a private citizen to public use, by a mere ordinance so declaring, without the owner's acquiescence or consent. The State itself, which is greater than its creature, in the exercise of its right of eminent domain, could not constitutionally condemn private property to such uses, without a regular judgment of condemnation, in a proper judicial proceeding, first making payment of just compensation to the owner. Such is now, and has always been the express or implied requirement of our Constitution.—*New Orleans & Selma R. R. Co. v. Jones*, 68 Ala. 48. The binding force of this principle is recognized in the various charters of the city, from its first incorporation down to the day of the repeal of its charter in 1879; and there is no evidence in the record purporting to show that there was ever any attempt to condemn this property.

It is very clear that there was never any such conduct on the part of the owner, or uninterrupted user by the public, as to authorize the presumption of a dedication. In *Steele v. Sullivan*, 70 Ala. 589, we held that the dedication of a street, in an incorporated city or town, would not be presumed from mere user, unaccompanied by some clear and unequivocal act showing the owner's intention, for any period short of twenty years; and even this presumption may be rebutted, by showing that the right of user was always contested, or constantly interrupted by the owner. This principle is obviously fatal to any claim based on the presumption of any alleged dedication.—*Hoole v. Attorney-General*, 22 Ala. 190; *N. O. & S. Railroad Co. v. Jones*, 68 Ala. 48. A dedication must be first made by the owner, before any acceptance of it can follow on the part of corporate officers of a city. An acceptance without an offer, either express or implied, is nugatory.

The other assignments of error are not, in our opinion, well taken, and the judgment of the Circuit Court is affirmed.

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Certiorari to Court of County Revenue to Review Proceedings Establishing District in which Stock not allowed to Run at Large.

1. *Jurisdictional facts; duty of the court.*—In a petition to establish a district under act of the legislature, in which stock are not allowed to

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run at large, the averment of the desire for an order to be made establishing such district, describing it; that petitioners are residents of the district; and such petition is signed by the freeholders, and filed with the judge of probate at least thirty days before the next term of the court; and notices of the application given, as required by the act, the court must hear the petition and make an order granting or dismissing it, in whole or in part.

2. *Certiorari proper remedy when no mode of review provided; judgment to be rendered.*—No mode of review having been specifically provided, *certiorari* is the proper remedy to review the questions of jurisdiction and the regularity of proceedings in the Court of County Revenue; and a judgment quashing or affirming the proceedings, is the only judgment which can be rendered on review.

3. *Counties*, though bodies corporate under the statute, are, more strictly speaking, political or civil divisions—governmental or auxiliary agencies—and the powers conferred on them are delegated for the purposes of civil and political organization, and can not be said to be violative of the maxim that legislative powers can not be delegated.

APPEAL from the City Court of Selma.

Tried before the Hon. JON. HARALSON.

This was an appeal taken from the refusal of the judge of the City Court of Selma to grant the petition of the appellant, John Stanfill, praying for a writ of *certiorari*, directing the proceedings had in the Court of County Revenue of Dallas county, set forth in said petition, to be brought up for review in said City Court; and originated as follows: A petition signed by Jere Johnson and twelve others, was filed with the probate judge of Dallas county on the 2d day of October, 1885, which averred that said petitioners were freeholders residing in that portion of Dallas county, embraced in the district known as Old Town, Pine Flat and King's precincts; prayed an order of said court to establish said several precincts into a district, in which stock should not be allowed to run at large; and asked to prohibit the running at large of stock therein, according to the provisions of an act of the General Assembly of Alabama, approved Feb. 28th, 1881. Of the filing of this petition, notice was given by the probate judge, thirty days before the next ensuing term of the Court of County Revenue of said county of Dallas, by publication in *The Times-Argus*, a newspaper published in the city of Selma; by posting at the court-house door, and at five other public places in said district. Counter petitions, numerously signed by residents of said precincts, were also filed; witnesses were introduced, and the petition regularly heard. Counsel for counter petitioners objected to the consideration of the petition, on the ground that the act of the General Assembly, approved February 28th, 1881, giving the Court of County Revenue of Dallas county jurisdiction in such cases, was unconstitutional and void; which objection was overruled by the court, and counter petitioners excepted. The petition was granted,

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and an order establishing the district prayed for was made. Thereupon John Stanfill, one of said counter petitioners, petitioned for the writ of *certiorari* from the City Court, which was denied.

GASTON A. ROBBINS, for appellant.

N. H. R. DAWSON, for petitioners, made the following points: (1.) The original petition is sufficient, and sets out all the jurisdictional facts. It fully describes the district, alleges that the petitioners reside therein, and is signed by more than ten freeholders. The petition was filed with the judge of probate thirty days before the next ensuing term; notices were given by posting one notice at the court-house door and five copies at as many different public places in the district; and by publishing one notice of the application in a newspaper published in Dallas county. (2.) The order of the court is sufficient. It granted the petition, extending the law over *two* precincts—the act providing that the court may grant or dismiss the petition *in whole or in part*. (3.) Except as restrained by constitutional provisions, State and Federal, the General Assembly of Alabama has the same plenary power as the British Parliament, subject to the qualification that the power is purely legislative in its character.—*Dorman v. The State*, 34 Ala. 316; *Davis v. The State*, 68 Ala. 60; *Van Hook v. City of Selma*, 70 Ala. 363. The act in question is violative of no provision of the constitution. (4.) Counties are *quasi* corporations, and exist under general laws of the State, for the greater convenience of government, and are vested with certain corporate powers.—Cooley's Constitutional Limitations, 240–1. The act under consideration simply authorizes the Court of Revenue to apply its provisions in a particular case, and to put it into operation.—13th Am. Rep. 716.

CLOPTON, J.—The act of the legislature, under which the proceedings were had, provides that whenever any ten freeholders petition in writing the Court of County Revenue, stating that they desire an order to be made establishing a district, wherein stock shall not be allowed to run at large; that they are residents of the district, fully describing it; and such petition is filed with the judge of probate at least thirty days before the next term of the court, and notices of the application are posted at the court-house, and at three public places in the district, and once in a newspaper, if one is published in the county, the court must hear the petition, and any persons opposed to it, and make an order granting or dismissing such petition, in whole or in part.—Acts, 1880–1, p. 163. The peti-

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tion is in writing, and signed by more than ten freeholders. It avers substantially all the jurisdictional facts, and was filed with the judge of probate thirty days before the next term of the court. Notices of the application were posted at the courthouse, at five public places in the district described, and published once in a newspaper. The petition is sufficient to put the jurisdiction of the court into exercise; the notices given were substantially such as required; the proceedings appear to be regular; and the order conforms to the requirements of the statute.

No mode of review having been specially provided, *certiorari* is the proper remedy. The office of a *certiorari*, at common law, extends to questions of jurisdiction, and of the regularity of the proceedings. Only errors of law apparent on an inspection of the record will be corrected. Neither conclusions of facts, nor the manner in which discretion has been exercised, will be reviewed, jurisdiction having attached. A judgment quashing or affirming the proceedings is the only judgment which can be rendered on review.—*Town of Camden v. Bloch*, 65 Ala. 236; *McAllilley v. Horton*, 75 Ala. 491.

While counties are declared by statute to be bodies corporate, they are, more strictly speaking, political or civil divisions, created and organized to aid in the administration of the State government—governmental or auxiliary agencies. They are created for the convenience, interests and benefit of the people residing in the territorial limits; and powers of local government are entrusted to the local authorities on the supposition that they possess more available means and opportunities to ascertain the needs and wishes of the people in respect to local matters, and are better qualified to determine what local regulations are important and contributive to their convenience and well being. From the origin of the government counties have been organized and existed; and the entrusting to their local authorities *quasi* legislative powers and functions has never been considered as violative of the maxim that legislative power can not be delegated. Such conferred powers are the powers of the State, and are conferred for the purposes of local and political organization. The Court of County Revenue is the authority that acts for and exercises the powers of Dallas county; and conceding that the power conferred by the act is *quasi* legislative, it constitutes no valid objection to its constitutionality.—*Askew v. Hale county*, 54 Ala. 639; *Cooley Con. Lim.*, 140.

Certiorari refused.

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Morris v. Robinson.*Trespass Quare Clausum Fregit.*

1. *Non-suit ; when statute authorizing not applicable to trespass quare clausum fregit.*—The statute authorizing a non-suit against the plaintiff, when his recovery is less than the minimum sum of which the court has jurisdiction (Code, § 3120), does not apply to an action of trespass *quare clausum fregit*.

2. *Costs taxed in favor of successful joint defendant.*—In a judgment in favor of one joint defendant and against another, a recital that the successful defendant “go hence and recover of the plaintiff his costs in this behalf expended,” means that he recover that part of the costs which he himself had incurred.

3. *Title not necessarily in issue, in trespass quare clausum fregit.*—Possession is the great underlying fact which supports the action, though in many cases title is material, as in mitigation of damages.

4. *Oral evidence of intention in deed.*—It is error to admit oral testimony of the intention with which a deed is executed.

APPEAL from Limestone Circuit Court.

Tried before the Hon. H. C. SPEAKE.

This was an action brought by William G. Robinson against Ransom Harlow and Harrison L. Morris to recover damages for a trespass alleged to have been committed by the defendant upon the lands of plaintiff, on and after the 12th of March, 1884. The plea of defendants was “not guilty,” upon which issue was joined.

The plaintiff showed that he had been in possession of the land upon which the alleged trespass was committed for twenty-five years; that in March, 1884, the defendant, Morris, with two or three other men, came on the land, which was near plaintiff's house, and informed plaintiff that he, Morris, had come to move the fence; that plaintiff notified Morris that if he moved the fence he would prosecute him; that Morris, and those with him, did move the fence about twenty yards, which cut the plaintiff off from his crib, stable, shop, and spring, besides turning out some of plaintiff's fruit trees, which latter were injured by stock. Plaintiff testified that he recovered the land in a few days in an unlawful detainer-suit before a justice of the peace. On cross-examination, plaintiff testified that no angry or offensive words or language were used by defendant, Morris, or those with him, on the occasion. Witness further testified that, in 1877, he gave McWilliams & Woodfin a mortgage on the land in controversy; that this mortgage was fore-

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closed and one R. H. Harlow, became the purchaser; that witness, the plaintiff, redeemed the land with \$200, borrowed from Wm. G. Robinson, Jr., and the defendant, Harlow, to whom he executed a deed to the land; that they, in turn, sold and conveyed by deed to defendant Morris, under which deed defendant claims that he entered upon the land. Plaintiff's attorney then asked him to state upon what agreement or understanding the deed from him to said Robinson & Harlow was executed. To this question defendants objected. The court allowed the question and defendants excepted. Plaintiffs answered that it was made to secure them temporarily for the loan of the \$200, with which he had redeemed the land. To this answer defendants excepted; the court allowed the question, and defendants excepted.

Defendants then offered in evidence the deed executed to defendant Morris from Robinson & Harlow and the other conveyances named above. Defendant Morris testified that he thought he had a right to move the fence; that he told the plaintiff he could lay down the fence and go to his crib and stable, &c., awhile, and that plaintiff did this; that no fruit trees were injured, and that the land was restored to plaintiff in a few days. Other witnesses were examined whose testimony was merely cumulative.

The court in the general charge to the jury said: "A man can not take possession of his own property, however peaceably or quietly, if it is in the actual possession of another, without the consent, or against the will of the latter." To which charge defendants excepted. The defendants then asked the following written charges: 1. "If a man is rightfully in possession, he may use such force as is necessary to protect his possession, without himself being guilty of a breach of the peace. But, if he has, by a deed or other writing, given another the right, or color of right, to the possession, or to the property, that other person may take possession, if he can do it without using violence or force, or committing a breach of the peace." 3. "Even if this deed is void as a conveyance, it is valid as a license or permit to take peaceable, quiet possession of the land, no breach of the peace attending it." 8. "If you find that the defendants, or either of them, owned this land at the time of the alleged trespass, he or they had a right to take possession of the land without the consent, and against the will of the plaintiff, provided he or they did so peaceably and without violence or other breach of the peace, and such taking being the exercise of a right, will not constitute him or them trespassers"—which charges were severally refused, and defendants excepted to each refusal of the court to give the several charges asked. The verdict was in favor of the plaintiff against the defendant Morris, and assessed his

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damages at fifty dollars; but in favor of the defendant Harlow. The judgment of the court was, that the plaintiff recover of the defendant, Morris, the aforesaid sum of fifty dollars, besides his costs; and it was "further considered by the court that the defendant Harlow go hence and recover of the plaintiff his costs in this behalf expended." The record does not contain any assignment of errors.

R. A. McCLELLAN, for appellant, insisted: 1. That the plaintiff should be non-suited for want of jurisdiction of the Circuit Court to entertain this suit; that the 5th section of the 6th article of the constitution provides that "in civil cases" the Circuit Court "shall have jurisdiction only when the matter or sum in controversy exceeds fifty dollars," and that though there were decisions in this court that actions *ex delicto* are not "civil cases," the statute had but provided for an evasion of the constitution, and said decisions were unsound, and should not be followed. The sum recovered should be the criterion of jurisdiction—See 2 Ala. 24; 15 Ala. 675, and 17 Ala. 628. This is the rule laid down in 64 Ala. 236, as to "the matter" in dispute. 2. It was palpable error to admit parol evidence to vary or contradict the deed.—1 Brick. Dig. 865; 1 Gr. Ev. 275; 2 Wharton Ev. 920; 69 Ala. 522. Parol evidence was incompetent whether the deed was valid or void.—24 Ala. 347; 72 Ala. 77; 62 Ala. 427-30; 69 Ala. 442; 54 Ala. 141; 61 Ala. 25; 76 Ala. 600.

W. R. FRANCIS, and HUMES, GORDON & SHEFFEY, *contra*. 1. It has been repeatedly held by this court that in actions *ex delicto*, the test of jurisdiction is the amount *claimed*, and that section 3120 of the Code applies to moneyed demands only. *King v. Parmer*, 34 Ala. 416; *Haws v. Morgan*, 59 Ala. 508. The judgment was in strict conformity to the Code, § 3143. The deed was only collaterally in issue, and was not offered as a muniment of title; the rule invoked by the defendant therefore had no application.—67 Ala. 504. The evidence showed that the plaintiff had been in the possession of the premises for twenty-five years. If, then, it was a homestead, the acknowledgement by the wife did not conform to the requirements of the law, and the deed was therefore void.—*Motes v. Carter*, 73 Ala. 553. If void, no question can arise as to the admission of parol evidence to vary or contradict its terms, since the inhibition is against parol evidence to vary or contradict the terms of a *valid* written instrument.—1 Gr. Ev. § 275.

Upon the question of trespass, appellees cited—14 Am. Law Review, p. 13; 37 Ala. 35; 67 Ala. 101-4; 4 Porter, 494; 10 Ala. 15; 61 Ala. 9; 71 Ala. 115; 44 Vt. 442; 57 Ill. 253;

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63 Ill. 389; 42 Conn. 158; 25 Ark. 436; 46 Col. 191; 74 Me. 163; 128 Mass. 552 and 49 Wis. 661. Also, 35 Am. Rep. 796.

STONE, C. J.—The present suit counts in trespass *quare clausum fregit*. The recovery was for precisely fifty dollars, and defendant moved to non-suit the plaintiff under § 3120 of the Code of 1876. That motion was rightly overruled.—*King v. Parmer*, 34 Ala. 416; *Haws v. Morgan*, 59 Ala. 508.

The suit was against Harlow and Morris, but the verdict was only against Morris—finding in favor of the defendant Harlow. It is objected to the verdict that it does not award to him his costs, under § 3143 of the Code. The judgment is that Harlow “go hence, and recover of the plaintiff his costs in this behalf expended.” The meaning of this is, that he recover that part of the costs which he himself had incurred. The statute—§ 3143—declares that a defendant jointly sued with others, against whom plaintiff fails to recover, is entitled to have his *aliquot* proportion of the whole costs taxed against the plaintiff. There being but two defendants, this required that half of the whole costs should be taxed against the plaintiff.

In trespass *quare clausum fregit*, title is not necessarily in issue, although there are many cases in which it does become material. Possession is the great underlying fact which supports the action, but title is sometimes material, in defining the extent of the possession. There are other points of view in which title sometimes becomes a material inquiry.—6 Wait. Ac. and Def. 64–5. And it may become material sometimes in mitigation of damages. One having title, or honestly believing he has title to lands, who takes possession peaceably, in the honest belief he may do so, would receive less condemnation by a jury, than if he were a willful trespasser, asserting no claim of right. Punitive damages are largely dependent on the manner, animus or motive with which the tort is committed.—1 Sedgw. Dam. * 115, n.

The testimony was permitted to take a somewhat latitudinous range on the trial of this cause. We are at a loss to perceive the pertinency of the mortgage to McWilliams & Woodfin, the sale and conveyance by them to Harlow, conveyance by Harlow and wife to S. E. Morris, and re-conveyance by her back to William G. Robinson, the original owner and mortgagor. The effect of these was to re-vest the title in the original owner, and it is not perceived that any material question of law or fact, growing out of these several transactions, can shed any light on the questions at issue in this cause, or the motive which influenced Morris in the alleged trespass. Imma-

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terial testimony, though not apparently hurtful, should never be allowed to go before the jury.

Robinson and wife, in 1879, conveyed the lands on which the alleged trespass was committed, to Harlow and Robinson, Jr., on a recited consideration of two hundred dollars. The deed and certificate of acknowledgement are in all respects regular to convey the title to lands other than a homestead. There was no certificate of privy examination. There was no proof that the lands were part of the homestead, nor is there proof that they were occupied in connection with the lands on which Robinson resided. There were some facts and circumstances in evidence, which possibly might have justified their submission to the jury on the inquiry of homestead *vel non*; but they are too indeterminate to authorize us to predicate as fact, that the *locus in quo* was part of the homestead. In our rulings, therefore, we can not assume as fact, that the lands alleged to have been trespassed on, were a part of Robinson's homestead. There is testimony, uncontradicted, that the deed from Robinson to Harlow and Robinson, Jr., though absolute in terms, was, by verbal agreement, intended only as a security.

More than four years after the conveyance from Robinson and wife to Harlow and Robinson, Jr., the said grantees, Harlow and Robinson, Jr., sold and conveyed the lands to H. L. Morris, the defendant in this action of trespass. There is no proof tending to show that the latter had any knowledge or notice that there were conditions, or verbal agreements of any kind, varying the absolute terms of the deed from Robinson to Harlow and Robinson, Jr. The plaintiff was permitted to prove, against the objection and exception of defendant, that the deed he made to Harlow and Robinson, Sr., was intended and understood as a temporary arrangement, and that a deed to another piece of land was to be substituted for it, whenever the numbers or correct description of the latter tract could be ascertained. The testimony was in conflict on this. In admitting this testimony the Circuit Court erred. We can not perceive how, if such agreement was made, it could become a material element in the *quantum* of damages plaintiff had sustained from the tortious act of the defendant. If Morris had sued for the lands, relying on his title for a recovery such agreement would be no defense to the action. And in cases like the present, its only tendency was to confuse the jury by presenting an immaterial contention for their inquiry.

The Circuit Court did not err in the charges given and refused.—*Turnley v. Harrison*, 67 Ala. 101; *Mason v. Hawes*, 52 Conn. 12; s. c. 52 Amer. Rep. 552.

Reversed and remanded.

Smith et al. v. Gillam et al.*Bill in Equity by Creditor for Right of Subrogation.*

1. *Subrogation of creditor to right of security given by surety to his principal.*—A mortgage executed by a principal debtor to indemnify his surety, creates a trust fund for the payment of the debt, to the benefit of which the creditor is entitled, by way of subrogation.

2. *Bar of mortgage debt does not affect specific lien of mortgage.*—The failure of the mortgagee to present his claim for the mortgage debt, within the time prescribed by the statute of non-claim, does not affect his specific lien in, or title to the property.

3. *Claim of title distinguished from mere claim against estate.*—Claims of title, whether legal or equitable, do not come within the statute of non-claim, and can not in any just sense be said to be claims against the "estate" of the deceased, but assertions that the property claimed does not belong to the estate.

4. *Same; Watson v. Rose's Ex'rs* (51 Ala.) *overruled.*—There is no distinction in the principle, whether the mortgage or other lien is held by the creditor himself, or by a surety. The contrary doctrine asserted in *Watson v. Rose's Ex'rs*, 51 Ala. 292, is wrong, and that case is expressly overruled.

5. *Discharge of principal by operation of law not discharge of surety.* The discharge of a principal by operation of law, as in case of bankruptcy, insolvency, or of non-claim, does not operate to discharge a surety who is liable for a debt.

6. *Adverse possession.*—The rule on the subject of adverse possession by the alienee of a mortgagor is correctly and clearly stated in the case of *The State v. Conner*, 69 Ala. 212.

7. *Title barred—trustee—cestui que trust.*—When the title of the trustee is barred, so also is that of the *cestui que trust*.

APPEAL from the Chancery Court of Tallapoosa.

Heard before Hon. N. S. GRAHAM.

The bill in this case was filed by Harry J. Gillam and Mary J. Gillam, the heirs-at-law of Harry Gillam, deceased, and charged that one William M. A. Mitchell was indebted to the estate of their father by promissory notes, with John Rowe and Salmon Washburne as sureties thereon; that on the 19th of March, 1866, the said Mitchell, "being desirous to secure the said John Rowe against loss by virtue of his suretyship on said notes," executed and delivered to him a mortgage upon certain lands, set out in the bill. The bill further charges, that said mortgage deed was executed and delivered to said John Rowe by said Mitchell, for the purpose of indemnifying the said Rowe against any loss by reason of his suretyship on said notes, and also to secure the prompt payment of the same. Said notes were transferred, by the administrator of Harry Gillam's estate,

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to the guardian, B. S. Johnson, of complainants, as their distributive share of the estate, who reduced them to judgment at the Fall term, 1866, of the Circuit Court of Tallapoosa county, against the said Mitchell and John Rowe. The bill avers that both Mitchell and Rowe had died before the filing of this bill, and that both were insolvent; that the said B. S. Johnson had died without making final settlement of his guardianship of complainants, and that at the time of his death, he was indebted to complainants as their guardian, in the full amount of the judgment obtained by him against Mitchell and Rowe; that he left a will appointing his widow, Elizabeth F. Johnson, as executrix, who had qualified and was proceeding to execute said will.

The bill avers, also, that Independence Jane Mitchell, the widow of the said William M. A. Mitchell, was asserting claim to a part of the lands embraced in said mortgage, as her homestead, and was receiving the rents and profits of the same.

The bill prays for an account of the amount due complainants on said judgment; that a trust be decreed in the mortgaged premises in favor of complainants, and that they be subrogated to all the rights of an equitable mortgagee as to said mortgaged property; prays for a sale of the mortgaged property and an application of the proceeds to the payment of complainants' judgment, &c.

Independence J. Mitchell, the widow, Reuben A. Mitchell, as the executor, and the children of William M. A. Mitchell; Elizabeth F. Johnson, the executrix of B. S. Johnson, and the heirs-at-law of John Rowe, were made parties defendant.

R. A. Mitchell, as the executor of the estate of William M. A. Mitchell, demurred to the bill on the ground that it sought a settlement and accounting of *one item only* of the guardian's indebtedness to complainants, and *did not seek a final settlement* of such guardianship.

This demurrer was overruled. Other defendants interposed various demurrers, all of which were overruled.

R. A. Mitchell, as executor of William Mitchell, answered, setting up, by plea, the statute of non-claim of eighteen months, and averred that the claim of complainants had not been presented to him within eighteen months after the grant of letters testamentary to him on said William Mitchell's estate, claiming that it was therefore forever barred as against said estate; and that complainants could not be subrogated so as to maintain this suit thus barred against the principal debtor. This plea was declared insufficient and overruled.

Two of the defendants, B. S. Smith and J. F. Lovejoy, filed a joint answer, claiming a part of the lands sought to be subjected to complainants' claim; said Smith claiming that he pur-

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chased from William M. A. Mitchell on the 12th of February, 1870, in good faith, without any notice of any encumbrance on the land he bought, had paid the full amount of the purchase-money, received a warranty deed, and had been put in possession and had continuously held possession, openly and adversely, for more than ten years before the filing of complainants' bill, except two acres of said purchase, which he had sold to the said Lovejoy, who claimed adverse possession of ten years.

The chancellor overruled the pleas of these defendants, and rendered a decree granting the relief prayed by complainants, giving them a lien upon all the lands in the mortgage executed by William M. A. Mitchell to John Rowe, ordered an account to be taken of complainants' debt, and a sale of the lands to pay the same, with authority to the register to issue a writ of possession to purchaser or purchasers at such sale. From this decree, and from the previous decrees upon demurrers, appellants take this appeal, assigning said decrees as error.

W. D. BULGER, W. H. BARNES, OLIVER & GARRETT, for appellants.—1. The debt sought to be recovered not having been presented as a claim against William M. A. Mitchell's estate within eighteen months from the grant of letters of administration upon said estate, the claim was forever barred, and the debt *destroyed*.—*Puryear v. Puryear*, 34 Ala. 555; *Thrash v. Sumwall*, 5 Ala. 13; *Watson v. Rose's Ex'rs*, 51 Ala. 292; *Murdock v. Rousseau's Adm'r*, 32 Ala. 611; *Roy v. Thompson*, 43 Ala. 450. 2. The mortgage is but incident to the debt, and if the debt is *paid*, *extinguished* or *destroyed*, the mortgage has no vitality.—*Duval's Heirs v. McLoskey*, 1 Ala. 708; *Emanuel & Gaines v. Hunt*, 2 Ala. 190. There being no debt, there can be no mortgage. 3. By the proof, B. S. Smith was, in his life-time, an adverse holder of the land, *bona fide*, under color of title, for more than ten years, before the filing of complainants' bill. The chancellor should have decreed against complainants as to the B. S. Smith lands.—*Walker v. Crawford*, 70 Ala. 567; *Farmer v. Eslava*, 11 Ala. 1028; *Tayloe v. Dugger*, 66 Ala. 444.

JOHN M. CHILTON, and J. A. TERRELL, *contra*, cited *Ohio Life Ins. Co. v. Ledyard*, 8 Ala. 626; *Toulmin et al. v. Hamilton*, 7 Ala. 362; *Daniel v. Hunt*, 77 Ala. 567.

SOMERVILLE, J.—The bill in this case was filed by two wards against the executrix of their deceased guardian and others, claiming the right to be subrogated to the benefit of a mortgage, executed by a principal debtor of the ward's estate to a surety on the debt for the purpose of indemnifying and

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securing him. The debt was reduced to judgment in favor of the guardian, Johnson, in the fall of 1886, against all the makers of the note by which it was evidenced. In March, 1886, the mortgage in question was executed by one Mitchell, the principal debtor, to his surety, Rowe, being duly registered as required by law.

The nature of this security does not admit of any doubt. It is not only one of indemnity to the surety, but it was given to secure the debt. It provides that the mortgagee may sell the lands conveyed in the event of the mortgagor's failure or refusal to pay the mortgage debt. A trust fund was thus created for the payment of the debt, to the benefit of which the creditor was entitled, by way of subrogation, whether the surety was actually damnified or not. This principle is well established by a long line of authorities in this State, which will be found cited and discussed at some length by us, in the case of *Daniel v. Hunt*, 77 Ala. 567.

We are satisfied from the testimony that the complainants are the sole beneficial owners of the judgment recovered by their guardian, in which the debt secured by the mortgage was merged. Their guardian, who was the plaintiff in the judgment, was their trustee and certainly recovered it for their benefit. Upon the death of the guardian the legal title of the claim passed to his personal representative, who is made a party defendant to the present suit. The whole ownership, legal and equitable, was therefore vested in the wards and the executrix of their guardian, and in no other person. It is shown, however, that there was a settlement between the parties, prior to this suit, in which receipts were given by the complainants in full of all demands against the guardian or his estate. We are satisfied this judgment against Mitchell and Rowe was not included in this settlement. This is asserted by the complainants, and the executrix also admits and testifies to the fact. She disclaims all interest in it in favor of complainants, and this is conclusive against the defendants, affording them full protection in the event of their paying or satisfying it. The demurrer to the bill, based on this phase of the case, was properly overruled. It misapprehended the scope and purpose of the bill as one filed for the settlement of the guardianship, and, as such, defective in demanding a partial account of one item only instead of a full and final accounting. Its purpose was to claim the equitable ownership in the mortgage debt as a specific trust fund, and to have the mortgage given by Mitchell to Rowe foreclosed in favor of the complainants.

The fact that the mortgage debt was barred by the statute of non-claim as against the estate of Mitchell, the mortgagor, was

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no defense to this suit, so far as the mere foreclosure of the mortgage itself was concerned. It has long been settled in this State that the failure of a mortgagee to present his claim for the mortgage debt, within the time prescribed by the statute of non-claim, does not affect his specific lien in, or title to the property. The claim itself as a moneyed demand is declared to be "forever barred," and it is no doubt extinguished so far as the general liability of the decedent's estate is concerned. *Duval v. McLoskey*, 1 Ala. 708; Code, 1876, § 2597. But claims of *title*, whether legal or equitable, do not come within the statute, and, as observed in *Locke v. Palmer*, 26 Ala. 312, 324, "can not, in any just sense be said to be claims against the estate of the deceased; (but) on the contrary, the right to recover is based upon the fact that the property claimed does not belong to the estate."—*Rhodes v. Hannah's Adm'r.*, 66 Ala. 215. In *Flinn v. Barber*, 61 Ala. 530, this principle was held applicable to an ordinary vendor's lien, where a conveyance of title had been made to the vendee, and in *Mahone v. Maddock*, 44 Ala. 92, it was applied to a vendor's lien acquired under a bond to convey title, the court holding that the failure to present the claim to the administrator of the debtor's estate did not, in either case, cut off the lien on the land, but only extinguished the right of the creditor to participate, with the other creditors, in the distribution of the general estate of the decedent. We consider this to be a rule of property in this State, which is not to be disturbed except by legislative enactment.

It is said, however, that this principle is applicable only when the mortgage or other lien is held by the creditor himself, and that it can not be permitted to apply where it is held by a surety, although it was given to indemnify the surety and to secure the debt. The argument is that the debt due by the principal to the creditor, being barred as against the estate, is thereby extinguished, and that the creditor can not come into a court of equity asking for the condemnation of property to satisfy an extinguished debt. The case of *Watson v. Rose's Ex'rs.*, 51 Ala. 292, is cited in support of this view and sustains it. The doctrine of that case is in our judgment wrong, and we have no hesitation in declaring it overruled. The fallacy upon which it rests is manifest. It regards the debt as extinguished in the sense that it has been paid and satisfied, and seeks to make a distinction between a mortgage conveyance made directly to a party, and one made to a trustee for his benefit. The discharge of a principal by operation of law, as in case of bankruptcy, insolvency, or of non-claim, does not operate to discharge a surety who is liable for a debt.—*State v. Parker*, 72 Ala. 181; *Garrett v. Roper*, 10 Ala. 842. The

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discharge of Mitchell's estate because of a failure to present the claim did not satisfy the debt. His surety Rowe was still liable on it, just as if the principal debtor was still living. The title held by him as mortgagee of the lands in dispute was vested in him to indemnify him against this liability. He held it as trustee for the creditor, and equity will regard the possession of the trustee, actual or constructive, as that of the beneficiary. Subrogation is merely the substitution of one person to the rights of another by transfer. It would be violative of many sound rules of law, as well as repugnant to a spirit of honest and fair dealing, to sustain the distinction thus contended for by the learned counsel for the appellees.

The decree of the chancellor is in full harmony with the foregoing views.

But there is one view of the case in which we do not concur with him. It is our opinion that the claim of the mortgagee, and therefore of the complainants who can be subrogated only to his rights, was barred by the statute of limitations of ten years so far as regards the lands conveyed by the mortgagor, Mitchell and his wife, to Benjamin S. Smith by deed of conveyance bearing date February 12th, 1870. In 1874 two acres of this land were conveyed by Smith to one Lovejoy, who is also a defendant to the suit, and sets up the statute of limitations as a defense.

The rule on the subject of adverse possession by the alienee of a mortgagor is correctly and clearly stated in *The State v. Conner*, 69 Ala. 212, where a distinction is drawn between such a case and that of a sub-vendee, who takes a conveyance and holds adversely under one who is a mere executory purchaser without title. As the mortgagor himself does not *prima facie* hold adversely, but in subordination to the title of the mortgagee, the presumption is that the alienee of the mortgagor holds in the same right, and asserts no higher claim of title. "To convey such possession into an adverse holding, there must be a renunciation or disclaimer of the mortgagee's right, and that renunciation must be traced to his knowledge. Till this is done such possession is not regarded as adverse." *State v. Conner, supra*, and cases there cited; *Coyle v. Wilkens*, 57 Ala. 108. The rule is the same as that which governs in the case of an adverse holding by the trustee of an express trust, of a tenant against his landlord, or of one tenant in common against another.—*McCarthy v. McCarthy*, 74 Ala. 546; *Mastie v. Aiken*, 67 Ala. 313; *Brady v. Huff*, 75 Ala. 80. The knowledge which is thus required need not always be actual, but it may be constructive or imputed by law—*Wells v. Sheerer*, 78 Ala. 142; *Lucas v. Daniels*, 34 Ala. 188.

The testimony shows such an adverse holding by Smith, and

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his sub-vendee Lovejoy, as in our opinion to impute knowledge to Rowe, the mortgagee. The deed from Mitchell to Smith was executed in February, 1870, more than ten years before the present bill was filed, which was not until March, 1881. It was a warranty deed, as was that from Smith to Lovejoy for the two acres sold him. Full consideration was paid for the land, and the purchasers were placed in possession. Improvements were made upon the premises by both parties, such as fencing and outhouses, and there seems to have been an unequivocal assertion of exclusive ownership by a possession and claim of title which were open, notorious, and hostile in its nature. The mortgagee, Rowe, had publicly stated at a sheriff's sale of some of the lands included in the mortgage that the debt was settled and free from any lien in his favor. He made a like statement to others in the neighborhood, and no doubt was honest in entertaining such a belief in view of the facts. It is not unlikely that his statement was known to Smith in view of its great publicity. These facts convince us that Rowe must have known that the possession of Smith, and those holding under him, was hostile to his title as mortgagee, the validity of which he had himself thus disavowed and repudiated so openly. In our opinion, the chancellor erred in not sustaining the statute of limitations as a bar to complainant's suit, so far as regards the lands conveyed by Mitchell and wife to Smith, as described in their deed bearing date February 12th, 1870.

Such possession operating to bar Rowe, who held the title of a mortgagee, would also bar the complainants. When the title of the trustee is barred, so also is that of the *cestui que trust*. *Mastie v. Aiken*, 67 Ala. 313; 1 Brick. Dig. p. 51, §§ 39-40; 6 Perry on Trusts, § 663.

The decree of the chancellor will be reversed, and a decree will be rendered in this court foreclosing the mortgage, for the benefit of the complainants, as to all the lands except those conveyed to Benjamin S. Smith by the deed of Mitchell and wife, in accordance with the prayer of the bill. The costs in this court and the court below will be paid out of the proceeds of sale.

Wofford et als. v. Baker.

Certiorari of Justice's Judgment to Circuit Court.

1. *Action by married woman on note payable to herself.*—In an action by a married woman in her own name, on a promissory note payable to herself, a plea averring that the note “was given for certain accounts transferred to plaintiff directly by her husband,” but not averring that the transfer was made during coverture, does not negative the fact that the note is held as part of her statutory estate, and is fatally defective.

APPEAL from Etowah Circuit Court.

Tried before Hon. JAMES E. COBB.

The facts sufficiently appear in the opinion.

DUNLAP & DORTCH, for appellants.

AMOS E. GOODHUE, *contra*.

CLOPTON, J.—Three several suits were brought by appellee, in her own name, before a justice of the peace, against the appellant Wofford, on three promissory notes, which were made by Wofford payable to appellee. Judgments by default were rendered against Wofford by the justice of the peace, and the proceedings were afterwards removed by *certiorari* into the Circuit Court, where the three suits were consolidated. In the Circuit Court the defendant filed a special plea, averring substantially, that the plaintiff was a married woman at the time the suits were commenced, and at the time of filing the plea, residing with her husband in this State, and that the notes sued on “were given for certain accounts, which said accounts were transferred directly by H. H. Baker, husband of said plaintiff, to said Mary M. Baker, wife of said H. H. Baker.” The special plea is founded on the theory, that when the husband conveys property directly to his wife, such conveyance generally creates in her an equitable separate estate.

While it is not necessary that a plea in bar should be of such degree of certainty as to preclude a conclusion otherwise, and is sufficient if it shows *prima facie* a bar to the action; when it is intended to deny the right of the plaintiff to bring the action, a plea is insufficient, which fails to allege facts negating such right, if the right of the plaintiff to sue appears *prima*

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facie from the averments of the complaint. The presumption in this State is, so long after the passage of the acts, that the separate estate of a married woman is statutory, unless shown to be otherwise, and except where the rules of good pleading require the particular nature of the estate to be averred. The complaints, shown by the record, allege that the notes were made by the defendant payable to the plaintiff. The alleged facts constitute the notes the statutory separate estate of the plaintiff, unless their legal effect is disproved or negatived by other facts. A plea to the whole complaint should answer the entire action; and when the complaint alleges facts, which show the right of the plaintiff to bring the suit, which may be avoided, the plea should state the facts in avoidance. The coverture of the plaintiff at the time the suit was brought, and the notes being given for accounts transferred by her husband, do not, of themselves, constitute a defense to the action. It should have been alleged that the accounts were transferred pending the coverture; for if transferred before marriage, even in contemplation thereof, they became, on marriage, her statutory separate estate. The plea is in this respect fatally defective. Every fact stated in the plea may be true, and yet the notes be the statutory separate estate of the plaintiff.

Affirmed.

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Statutory Real Action in the Nature of Ejectment.

1. (*Adverse possession perfects title*).—Uninterrupted possession by defendant and his vendor, for twenty-eight years before suit brought, under written claim of title, accompanied by the usual acts of ownership, “perfects a title against all the world, unless there be a claimant armed with a paramount title, yet so circumstanced that he could not assert his title until the occurrence of an event which has happened within less than ten years before the commencement of the suit.”

2. (“*Rule in Shelley’s Case*” applied—*Right of heirs to sue*).—The “*Rule in Shelley’s Case*,” as at common law, prevailed in this State until the 17th January, 1853, when the Code of 1852 became operative; and deeds and wills which took effect before that date, are governed by it.

3. *Same*.—A deed, executed in 1841, by which lands were conveyed to a trustee, “for the purpose of providing a permanent domicile and home for the said Jane C. M.,” a married woman, “and such family as she may have, for their use and benefit during her natural life, and at her death to descend to and be equally divided among and between her heirs,” under the operation of the rule in Shelley’s Case, vested

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the entire estate in Mrs. M.; and if her children took any present interest, as members of "the family," their right to sue for it was not postponed until her death.

APPEAL from Lowndes Circuit Court.

Tried before Hon. JOHN MOORE.

This action was brought by the children, heirs at law of Jane C. McMeans, against James G. McQueen, to recover a tract of land lying in Lowndes county, with damages for its detention; and was commenced December 9th, 1884. The defendant pleaded: 1. The general issue. 2. The statute of limitations of ten years. 3. Adverse possession. 4. Statute of limitations of twenty years. Upon these pleas issue was joined. The plaintiffs, against the objection of the defendant, offered in evidence a deed executed by William Payne on the 17th July, 1841, conveying the lands in controversy to William A. T. Dunklin in trust for "Jane C. McMeans, wife of Seldon A. McMeans, and such family as she may have, for their use and benefit during the natural life of said Jane, free from the control of all and every person or persons, and at the death of said Jane, the said premises to descend to, and be equally divided among and between her heirs." It was further shown by the plaintiffs that William A. T. Dunklin, the trustee, died prior to 1857, and that Mrs. Jane C. McMeans died in 1882; that plaintiffs were her children, and that Mrs. McMeans and her children had been in possession of the lands continuously from 1841 to 1855.

The defendant introduced in evidence a power of attorney executed by Mrs. McMeans to T. J. Davis, authorizing him to sell and convey the lands described in the complaint, and also a deed made in pursuance of said power of attorney to A. B. McWhorter, executed 2d April, 1856. In connection with these instruments, the defendant showed that McWhorter entered and remained continuously in possession of the granted premises from 1856 to 1870; and that since the latter date the defendant had said McWhorter's possession continuously and uninterruptedly—both McWhorter and the defendant claiming the absolute title and making valuable erections thereon and exercising every right of ownership up to the time of the commencement of this suit in 1884. Upon this evidence, the court, at the request of the plaintiffs, charged the jury that if they believed the evidence they must find for the plaintiffs; to which charge of the court the defendant excepted, and assigns the same, together with the admission in evidence of Payne's deed, as error.

BREWER & LITTLE, for appellants.

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W. R. HOUGHTON, R. M. WILLIAMSON, *contra*.

STONE, C. J.—McWhorter went into possession of the lands sued for in 1856, under a deed of bargain and sale made by Mrs. McMeans through Davis her attorney in fact. Whether that deed was valid or not we need not inquire. When McWhorter purchased he went into possession, and remained in possession without interruption until 1870, claiming all the while in independent right, and exercising acts of ownership. From that time down to the trial in this cause, McQueen, the appellant, has had and held McWhorter's right, and has himself been in independent possession. During all that time—twenty-eight years—the said McWhorter and McQueen, each in his turn, has claimed and held possession as of right, has asserted and performed acts of ownership, and has made valuable and permanent improvements; thus asserting all the rights of absolute ownership. The present suit was brought in December, 1884. Time has perfected a title in McQueen against all the world, unless there be a claimant armed with a paramount title, and yet so circumstanced as that he could not assert such title until an event which has happened within less than ten years before this suit was brought.

Mrs. McMeans died in 1882, and the present suit is by her children who survived her. The title which Mrs. McMeans claimed, and which it is alleged she sold and conveyed to McWhorter, was conveyed to her in July, 1841, by William Payne. Plaintiffs claim that under that deed Mrs. McMeans, their mother, took only a life-estate, remainder to them as purchasers; and that they have the legal title, dating from the death of their mother in 1882. Defendant's answer to this claim is, that under Payne's deed Mrs. McMeans took an absolute title; and that the words of the deed which are relied on as creating a remainder in plaintiffs, are simply words of limitation, determining the quantity of the first taker's estate; and that plaintiffs can claim only by inheritance from their mother. If this be so, the mother's title being barred before her death, she left nothing for them to inherit, and this suit must fail.

The real question in this case is, whether Payne's deed, in its proper interpretation, falls within the rule in Shelley's case—a rule of interpretation under the common law which prevailed when this deed was made, but was repealed in this State by the Code of 1852. As said in 2 Washb. Real Prop. *268, the peculiarity of such estate is, that “while in form the estate has two parts, a particular one for life, with a contingent remainder to the heirs of the tenant who takes the particular estate, it is constructively a single estate of inheritance in the

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first taker. The form of limitation of such estates is to the grantee or devisee for life, and after his death to his heirs, or the heirs of his body, either mediately or immediately, both estates being created by the same deed or devise. This rule, instead of regarding a part of the entire estate as in the ancestor, and a part in his heirs, considers the entire estate as being in him alone."

As we have said, this rule of interpretation is not now the law of Alabama. It was changed a third of a century ago, Code of 1876, § 2183. Only deeds or wills executed before the adoption of our first Code—January 17, 1853—are governed by it. Few cases will hereafter come before us which can feel its influence. Alabama can now share with New York in the touchingly beautiful tribute paid to it by the learned and classical Kent.—4 Com. *283. We will, therefore, abstain from any elaborate consideration of its principles.

The question is not an open one in this court. We have three well considered decisions, pronounced on titles not distinguishable in principle from Mr. Payne's deed under which plaintiffs claim, in each of which the rule in Shelley's case was held to apply, and that the absolute title vested in the first taker.—*Lenoir v. Rainey*, 15 Ala. 667; *Hamner v. Smith*, 22 Ala. 433; *Martin v. McRee*, 30 Ala. 116. See, also, *Williamson v. Mason*, 23 Ala. 488; *McVay v. Ijams*, 27 Ala. 238; *Mason v. Pate*, 34 Ala. 379; *Roberts v. Ogbourne*, 37 Ala. 174.

If it be contended that under Payne's deed, the children took conjointly with their mother, as part of the "family" the deed was intended to provide for, this can not help appellees. Such construction would clothe the children with a right to sue as soon as McWhorter took possession as purchaser, in hostile claim to their rights; and allowing to the children the longest possible time for them to reach majority, the statute will long since have perfected a bar against them.

The Circuit Court erred in the charge given, as the plaintiffs showed no right to recover.

Reversed and remanded.

Loosse v. Vogel.*Motion to strike Bill of Exceptions from Record.*

1. *Bills of exceptions ; signed after adjournment of term.*—A presiding judge has no authority to sign a bill of exceptions after the adjournment of the court for the term at which the exceptions were taken, except by the written agreement of counsel.

2. *Rule for computing time in which act to be done.*—The rule for computing the time within which an act is stipulated to be done, is to exclude the first day and include the last. An agreement that a bill of exceptions might be signed within sixty days after the adjournment of court, adjournment being on May 2d, the sixty days expired on the 1st of July following.

APPEAL from Cullman Circuit Court.

Tried before Hon. JAMES AIKEN.

The opinion sufficiently sets out the facts.

W. T. L. COFER, for appellant. (No brief on file.)

GEO. H. PARKER, *contra*, cited Rev. Code, § 11 ; 36 Ala. 270 ; 37 Ala. 314 ; 42 Ala. 436 ; 44 Ala. 276 ; 47 Ala. 696.

SOMERVILLE, J.—This cause was submitted on its merits, and at the same time on a motion made by appellee's counsel to strike the bill of exceptions from the record.

The latter motion is based on the ground, that the bill was not signed by the presiding judge within the time specified in the written agreement of counsel, consenting that it might be signed after the adjournment of the Circuit Court. The court adjourned on May 2, 1885, and the agreement of counsel was signed and dated on that day. It provided that the bill of exceptions might be signed "within sixty days after the adjournment" of the court. It was only by virtue of this written agreement that the judge was authorized to sign it at all after the adjournment of the court during which the exceptions were taken.—Code, 1876, § 3113. It is manifest from calculation that, adopting the rule prescribed by section 11 of the Code for computing time—that is, excluding the first day, and including the last—the period of sixty days allowed by the agreement expired on July 1, 1885, this being the last day allowed for signing.—*Allen v. Elliott*, 67 Ala. 432. The bill of exceptions was not signed until July 2, or the day following. The motion to

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strike it from the record must, therefore, prevail.— *Woods v. Brown*, 8 Ala. 563.

No questions being reserved for our consideration except by the bill of exceptions, and it being stricken from the record, the judgment must necessarily be affirmed.

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Petition for Scire Facias, to Revive Chancery Decree, and for Issue of Execution in Foreclosure Proceeding.

1. *No execution can issue on decree foreclosing mortgage, until after sale of mortgaged property, and balance ascertained.*—By statutory provision (Code, § 3908), when an account is taken under a bill in chancery, and the amount of indebtedness between the parties ascertained by the decree of the court, the decree has the force and effect of a judgment, and execution may at once issue on it; but, on decree for the foreclosure of mortgages, or the enforcement of equitable liens, “no execution must issue until the property ordered to sale shall have been sold, and the sale confirmed, and the balance due ascertained by the decree of the court.”

2. *The statute contemplates two decrees, the second to be invoked by complainant, and not by the court ex mero motu.*—The statute contemplates a continuous proceeding, and a second decree after the sale, based upon the first, and ascertaining the balance due; which second decree must be invoked by the action of the complainant, and is not granted by the court *ex mero motu*.

3. *Scire facias; when not granted.*—After the lapse of eight years from the sale and its confirmation, during which period no action is had or asked in the cause, the suit is at an end, and the decree can neither be revived by *scire facias*, nor made the basis for a second decree, ascertaining the balance due, on which execution may issue.

APPEAL from Autauga Chancery Court.

Heard before the Hon. N. S. GRAHAM.

The proceedings in this cause grew out of a petition filed in the Chancery Court on the 6th April, 1885, by Isabella Presley, as administratrix, in which it was recited that at the Spring term, 1876, of said Chancery Court a decree had been rendered in favor of said Isabella Presley, as administratrix, against William McLean, on a bill filed for the foreclosure of a mortgage executed by the defendant on certain lands therein described, to secure the balance of purchase-money due for said lands; that a balance of two thousand and one 34-100 dollars was ascertained to be due complainant, which sum the defendant McLean was decreed to pay within thirty days, or in default of payment, the lands named in the mortgage were to be sold and

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the proceeds applied to the payment of said balance, after payment of costs. The petition further recites, that in accordance with the decree the lands were advertised and sold; at which sale the complainant, Isabella Presley, became the purchaser at the price of one thousand dollars, leaving a balance due on said decree of one thousand and twenty-one 55-100 dollars. The petition closed with a prayer for a *scire facias* to revive the decree rendered at the Spring term, 1876, as aforesaid, and for the issue of execution for the balance due on said decree.

The respondent filed a number of pleas to the petition, setting up that the cause had been discontinued; that complainant, by her long delay, had waived her right to proceed for any balance, and had elected to treat the sale under the mortgage as a *strict foreclosure*; that the balance sought to be recovered was barred by the statute of limitations; that the proceedings of the complainant after so great a lapse of time were inequitable.

A motion was made by the complainant to strike these pleas from the file, and the motion was overruled, and the petition of complainant was dismissed by the court. From these adverse rulings of the chancellor the complainant appeals, and assigns the same as error.

SADLER & HOLMES, and WATTS & SON, for appellant, cited Code of 1876, §§ 3908-9-12-13-14; 61 Ala. 80-4; Hermon on Ex. p. 32, § 112; 5 Ala. 188; 24 Ala. 701; Story Eq. Pl. § 365; 2 Dan. Ch. Pl. pp. 1757-8-9-60; 22 Ala. 549; 3 S. & P. 220; 21 Ala. 257; 22 Ala. 150; 25 Ala. 652; 18 Ala. 77; Waite's Ac. & Def. vol. 5, p. 641-2-3; Freeman on Ex. § 82; 66 N. C. 449; 1 A. K. Marshall, 201; 45 Miss. 712; Hermon on Ex. p. 32, § 42; 63 Ala. 361; 55 Ala. 539; 18 Ala. 715; 19 Ala. 271.

GUNTER & BLAKEY, *contra*, cited Story's Eq. Plead. § 354; 64 Ala. 345; 26 Ala. 52; 69 Ala. 164; 40 Ala. 712; 4 Stew. & Por. 138; 1 Wall. 73; 61 Ala. 80; 55 Ala. 547.

CLOPTON, J.—The decrees and orders of courts of equity, unless for a specific property, operate *in personam*, and were originally enforceable only by process of contempt. The power to enforce their decrees, by other processes and methods, has been greatly enlarged by statute, both in England and in this country. By our statute, all writs for the collection of money, or to obtain possession of real or personal property, in use in the common law courts, are to be adapted to the execution of decrees in the courts of chancery.—Code, § 3906. The statute does not enlarge the jurisdiction of the courts to *render decrees for money*; but confers authority to adapt the

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writs, in use in the common law courts, to the execution of such decrees, when legally and regularly rendered.

The bill, on which the decree, sought to be revived, was rendered, is not contained in the record; but we infer from what is disclosed, its purpose was the enforcement of a vendor's lien on lands. On such bill, a court of equity, in the absence of statutory authority, can render no decree, other than one directing a sale of the property; and though an ascertainment of the amount due is necessary, no execution could, independent of the statute hereafter noticed, be issued on such decree for the collection of the balance remaining unpaid, after the appropriation of the proceeds of sale. Such balance was recoverable only in a subsequent action at law.—*Winston v. Browning*, 61 Ala. 80.

For the purpose of preventing unnecessary delay, and a multiplicity of suits—of making one suit effectual to the protection and determination of all the rights of the parties—section 3908 of the Code was enacted, which provides: "Where bills are filed, or are now pending in any of the chancery courts of this State, for the foreclosure of mortgages, or the enforcement of vendors' liens upon any specific property, real or personal, and in all cases, where an account is taken between the parties, and the amount of indebtedness between them ascertained by the decree, of such chancery court, such decrees shall have the force and effect of judgments, and executions thereon may be issued by the register, against the goods, chattels, lands and tenements of the parties, against whom such decrees may have been rendered; but no execution must issue on decrees for the foreclosure of mortgages, or the enforcement of equitable liens, until the property ordered to sale shall have been sold, and the sale confirmed, and the balance due ascertained by the decree of such court, when execution must issue for the balance, which may be found due." The effect and operation of the statute are, to confer on the Chancery Courts new and additional power and jurisdiction in the rendition of decrees in the specified classes of suits—decrees having the force and effect of judgments—and to authorize a mode of proceeding for their enforcement not originally and formerly pursued. The rendition of such decrees, and the subsequent proceedings thereon, being of statutory origin, must be in substantial conformity with the statutory provisions and regulations.—*Sayre v. Elyton Land Co.*, 73 Ala. 85.

In all cases, where an account is taken between the parties, and the amount of indebtedness between them ascertained by the decree of the court, other than in suits for the foreclosure of mortgages, and for the enforcement of vendors' liens, the decree has, *eo instanti* on its rendition, the force and effect

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of a judgment, on which execution may be forthwith issued by the register. In suits for the foreclosure of mortgages, and for the enforcement of equitable liens, a different and particular provision is made, limiting and restricting the force and effect of the decree ascertaining the entire amount due, and directing a sale of the property, as a judgment—“*no execution must issue on decrees for the foreclosure of mortgages, or the enforcement of equitable liens, until the property ordered to sale shall have been sold, and the sale confirmed, and the balance due ascertained by the decree of such court, when execution must issue for the balance, which may be found due.*” The statute contemplates and provides for a second decree, the rendition of which is dependent on a sale of the property, and its confirmation. The second decree is founded on the first, as a judicial ascertainment of the entire amount of indebtedness, and the sale and its confirmation ascertain the amount of credit, where a decree is rendered, finding the balance due, for which execution must issue. Until a sale is made and confirmed, a decree for money, or a decree awarding execution is premature and invalid.—*Winston v. Browning, supra; Hughes v. Hatchett*, 55 Ala. 539; *Sayre v. Elyton Land Co.*, 73 Ala. 85. The legal effect of the decree made in 1876, which is sought to be revived, was to ascertain the amount, for which the property should be condemned to sale. It does not possess, under the statute or otherwise, the force and effect of a judgment, on which execution can issue. It is inchoate and conditional; wanting certainty of amount, an essential element of a judgment, capable of execution. The decree for money, which has the force and effect of a judgment, is the decree ascertaining the balance due after “the property ordered to sale shall have been sold, and the sale confirmed.” By this construction all the provisions of the statute are harmonized.

The decree, ascertaining the amount due, and directing a sale of the property, was made in May, 1876, and the sale was confirmed in the succeeding November. No further proceedings were had in the case, until March 27, 1885, when a *scire facias* was issued to revive the decree of May, 1876, have the balance ascertained, and execution for the same. Conceding that *scire facias* is an appropriate remedy to revive a decree for money, which has become dormant, and have execution thereof; we can not assent to the proposition that *scire facias* is a sufficient and adequate remedy to revive a decree, and have execution thereon, upon which no execution could have ever been legally issued. Resort, in such case, must be had to other, different and original proceedings. Counsel insist, however, that if such decree can not be revived, *scire facias* is a proper process to obtain, after confirmation of the

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sale, a decree ascertaining the balance due, as provided by the statute: that it must be regarded as a notice, that motion will be made for such decree, and that application therefor may be made at any time, before presumption of payment arises, or before the statute of limitations operates a bar. The vice of the proposition consists in the assumption, that the decree of the chancellor, ascertaining the amount of the purchase money due, has the force and effect of a judgment, capable of execution. We do not understand, that any question necessarily arises, as to the presumption of payment from the lapse of time, or of the bar of the statute of limitations. The true contention is, has there been a discontinuance by the *laches* of the complainant?

The mere failure of the register to place, or continue a cause on the docket, without some order of the court disposing of it, valid until reversed, or without the assent, concurrence or action of the complainant, will not operate a discontinuance, though no orders may have been in the cause at any of the intervenient terms. But if the cause is kept off the docket, or taken therefrom by the act of the plaintiff, or by his omission to do an act, preliminary to his right to have it placed, or continued on the docket, this will amount to a discontinuance. *Ex parte Horton*, 69 Ala. 164. The decree ascertaining the amount of purchase money due, and condemning the property to sale, the sale thereunder, its confirmation, and the application of the proceeds, finally disposed of the cause, according to the usual and original practice and proceedings in such cases in courts of equity.

The statute confers on complainant the right and privilege of obtaining, after the confirmation of the sale, a decree ascertaining the balance due, for which execution must issue. No gap or chasm in the proceedings is contemplated by the statute. The evident intention is a continuous proceeding in a continuous suit. It is not the duty of the chancellor to ascertain such balance, *ex mero motu*. Action on the part of the complainant is *preliminary* to a continuation of the cause on the docket for the rendition of the statutory decree. If the complainant fails to make the necessary application in a reasonable time after the final confirmation of the sale, no justifying cause for delay supervening, his right to a decree, ascertaining the deficiency, must be regarded and treated as waived, and the case must be held to have been finally disposed of, as it would have been, by the practice, orders and decrees of the court in the absence of the statute. The statute does not change or destroy the effect which the proceedings had, prior to its enactment, as a *final disposition of the suit*, unless, by positive action of the complainant, it is retained for the statutory purpose. The right to

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a decree for money is superadded, and only authorized after the suit has accomplished its original and primary object—the enforcement of the lien. The suit will be considered and treated as finally terminated by decree of the court, unless the statutory option to have a money decree is asserted in a reasonable time, after the *status* of the case and the proceedings therein authorize such application.

We will not attempt to lay down an absolute and unbending rule to govern all cases. There may exist circumstances, or proceedings, which excuse or necessitate an extension or postponement. In such case, however, the suit should be continued on the docket for the purpose of obtaining the statutory decree; and the application should follow the confirmation of the sale in the due and regular succession of judicial proceedings. A gap or chasm in the proceedings for more than eight years, after the confirmation of the sale, caused by the *laches* of complainant in asserting her statutory right to a money decree, operates a discontinuance of the suit *for such purpose*; and for the recovery of any balance due, she is remitted to some other appropriate action.

Affirmed.

Singer Manufacturing Co. v. Riley.

Statutory Action in Nature of Ejectment.

1. *Admission of secondary evidence.*—Where secondary evidence is offered to show the contents of a deed alleged to have been lost, it is not enough to show that search was made for the original; there must be diligent search at every place the paper would be likely to be found. The execution of the instrument, as well as its loss must be shown.

2. *Same; when error to admit.*—It is error to permit an alleged copy of a lost deed to be read to a witness, that witness may testify in regard to the contents of the original, and whether said alleged copy corresponds with witness' recollection of the original.

APPEAL from the Circuit Court of Lee.

Tried before the Hon. H. D. CLAYTON.

The facts in this case fully appear in the opinion of the court.

B. K. COLLIER, and GEO. P. HARRISON, for appellant, cited :
1. Gr. on Ev. §§ 558, 569, 572; *Askew Bros v. Steiner et al*,
76 Ala. 218, upon the insufficiency of the proof, offered by
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plaintiff, of the execution of the alleged deed from Torrey to Eason.

2. As to proof necessary to show loss of original: *Shorter v. Shepard*, 33 Ala. 648; *Mitchell v. Mitchell*, 3 Stew. & Port. 81; *Lee v. Mathews*, 10 Ala. 682; *Tatum v. Young*, 1 Port. 298; *Beall v. Dearing*, 7 Ala. 124.

W. J. SAMFORD, and A. A. DOZIER, *contra*. No brief in hands of reporter.

STONE, C. J.—This was a statutory real action instituted by Riley, and defended by the Singer Manufacturing Company. One link in the plaintiff's chain of title was an alleged deed from Torrey to Eason, the latter being plaintiff's grantor. The deed was alleged to be lost, and was attempted to be proved by copy. The copy offered is shown in the record. It purports to have two subscribing witnesses, one writing his name, and the other making his mark. It was never acknowledged or probated, but appears to have been recorded in the probate office. There is testimony, not contradicted, that the grantor, the grantee and both subscribing witnesses were dead when the trial took place. The copy deed offered is certified from the records of the probate office, but furnishes no evidence that it has been acknowledged, or its execution proved. It bears date May 23, 1870, and also bears the mark, "Filed in office for record February 17, 1875"—nearly five years afterwards—signed by the probate judge. This copy, or seeming copy of the deed is certified as a correct copy from the record of deeds and conveyances, and signed officially by the present probate judge. The paper was not self-proving.

The only testimony offered to prove the existence, contents and loss of the deed was that of Mrs. Eason, widow of the grantee, who could neither read nor write. Her testimony was as follows: "I am the widow of W. O. Eason. I can not read and write. Mr. Eason brought a deed over from Mr. Torrey's, and read it over to me, to lot 23, and gave it me to keep. * * I took the deed and put it away. I have looked for it and can not find it." On this testimony the plaintiff offered the copy deed in evidence, with certain testimony tending to prove it was a copy. The defendant objected that "there had been no sufficient proof of the loss of the deed." The objection was overruled and an exception was reserved. In this the Circuit Court erred. The natural import of Mrs. Eason's testimony, copied above, is, that soon after Torrey executed and delivered the deed to Eason, the latter brought it home and gave it to his wife to keep. She says she put it away, but does not say she put it where others would not have

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access to it. Moreover, the deed, according to the theory of the plaintiff's phase of the proof, was in the probate office, and necessarily out of Mrs. Eason's possession nearly five years after it was executed. The search should have been more diligent than Mrs. Eason's testimony tends to prove, and should have been extended to the probate office. Search is not enough. There must be diligent search at every place the paper would be likely to be found.—1 Greenl. Ev. § 558; *Mitchell v. Mitchell*, 3 Stew. & Por. 81; 1 Brick. Dig. §§ 632, 633. So, proof of the execution of the instrument, as well as proof of the loss must also be made.—*Comer v. Hart*, 79 Ala. 389.

Nor was the copy produced in any sense a conveyance of the title. It contains no words of sale or transfer, and is wholly inoperative as a deed of bargain and sale. It should not have been received in evidence.

The Circuit Court also erred in allowing the alleged copy of the deed to be read to the witness, that she might testify in regard to its contents, and whether or not it corresponded with her recollection of the deed read to her by her husband. *Jacques v. Horton*, 76 Ala. 238.

Reversed and remanded.

Powell v. Rankin & Co.

Little v. Rankin & Co.

Motion to Vacate Levy of Attachment on Goods Replevied.

1. *Personal property levied and replevied not subject to subsequent levy.* It is settled law in this State that personal property levied on by attachment or execution, and replevied, is in the custody of the law, and is not subject to levy by junior attachment or execution; and if a second levy is made, it will be vacated, on motion, by the party in interest.

APPEAL from the Circuit Court of Cullman.

Tried before HON. JAMES AIKEN.

N. L. Powell, a merchant in the town of Cullman, sold his stock of merchandise, on the 7th of November, 1884, to Absalom Little, who took possession of the goods. On the 10th of November, 1884, two attachments, one in favor of Carter, Dunbar & Co., and the other in favor of Buford, McLester & Co., issued against the said N. L. Powell, were, by the sheriff, levied upon the stock of goods, in the possession of said Little, who, on the 12th of November, 1884, made affidavit that the prop-

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perty was his, and gave bond as required by law in claim suits; whereupon the property was restored to his possession. Afterwards, on the 13th of November, 1884, the sheriff levied other attachments, one in favor of appellees, Rankin & Co., on the identical property in the possession of said Absalom Little, which he had recently replevied and taken into his possession. N. L. Powell and Absalom Little each made motion in the Circuit Court to vacate the levy of the attachment by Rankin & Co., and upon the trial of these motions the court below overruled the motions, to which action of the court moveants excepted, and assign the same for error.

H. L. WATLINGTON, for appellant, N. L. Powell.

GEO. H. PARKER, H. L. WATLINGTON, and HAMILL & LUSK, for appellant Little, insisted that so long as the property remained in the possession of the claimant it is regarded as in the custody of the law, and a second levy can not be made on it till the claim suit is determined—citing 1 Brick. Dig. p. 896; *McLemore v. Benbow*, 19 Ala. 76; *Kemp & Buckley v. Porter*, 7 Ala. 138; *Langdon & Co. v. Brumby*, 7 Ala. 53; *Rivers & Weems v. Wilbourne*, 6 Ala. 45; *Cordaman v. Malone*, 63 Ala. 556; *Scarborough v. Malone et al.*, 67 Ala. 570. 2. The claimant is a proper person to move to set aside the levy.—*McLemore's Adm'r v. Benbow*, 19 Ala. 76; *Lehman Bros. v. Howze et al.*, 73 Ala. 302; *Rhodes & Bradford v. Smith*, 66 Ala. 177. The case of *McLemore's Adm'r v. Benbow*, *supra*, is decisive of the case at bar.

W. T. L. COFER, for appellees. (No brief on file.)

SOMERVILLE, J.—It has long been settled law in this State, that where personal property is levied on under a writ of attachment, or of execution, and is replevied, either by the defendant, by a stranger in his behalf, or by a claimant who is not a party to the suit, and the property is delivered by the sheriff to such person, upon his executing a proper forthcoming bond in the manner prescribed by statute, the property is thus placed in the custody of the law, and a second attachment, or second execution not superior in lien, can not be levied on it by the sheriff, so long as its *status* remains unchanged. And, if such second levy is made, it will be vacated by the court having jurisdiction, on motion made by a party in interest who is prejudiced.—*Cordaman v. Malone*, 63 Ala. 556; *Scarborough v. Malone*, 67 Ala. 570; *McLemore v. Benbow*, 19 Ala. 76; *Rives v. Wilborne*, 6 Ala. 45; Code, 1876, §§ 3290, 3341. The doctrine thus settled is liable to grave abuses, of which we

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are not unmindful. And so the like would be true of the opposite rule, were it adopted. Our predecessors considered this subject in *Langdon v. Brumby*, 7 Ala. 53, and adhered to the principle which we have above announced; and it has not since been departed from in any subsequent decision.

The defendant in attachment, Powell, who is appellant, in the first of these causes, clearly had no such interest in the property, as to be in any manner prejudiced by the levy of the junior attachment in favor of appellees, which is sought to be vacated. He had sold the property to Little, and the motion could be made only in Little's name, as was properly done in the second of the above stated causes.

It follows that, in the first cause, there is no error prejudicial to appellant, Powell, and the judgment must be affirmed.

In the second cause, the judgment is reversed in behalf of the appellant, Little, and a judgment rendered in this court, vacating and setting aside the levy of the writ of attachment, issued in favor of the appellees, Rankin & Co.

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Attachment.

1. *Sufficiency of affidavit.*—In an affidavit for an attachment, while it is not permissible to state two or more grounds in the alternative, or disjunctively, two or more grounds may be stated cumulatively, or conjunctively, when they are not inconsistent with each other.

2. *Same.*—That the defendant in attachment is about to dispose of his property fraudulently, that he has fraudulently disposed of a part of his property, and that he has money, property, and effects, liable to satisfy his debts, which he fraudulently withholds, are not inconsistent grounds for suing out the writ, and may be stated conjunctively in the affidavit.

APPEAL from the Circuit Court of Calhoun.

Tried before the Hon. LEROY F. BOX.

This action was brought by D. H. Baker against A. W. Smith, and was commenced by attachment, sued out on the 14th Janury, 1886. The affidavit stated, as grounds for suing out the writ, "that the said A. W. Smith is about fraudulently to dispose of his property, and has fraudulently disposed of a part of his property, and has money, property and effects, liable to satisfy his debts, which he fraudulently withholds." The defendant cravedoyer of the affidavit, and pleaded in abatement of the attachment, on the ground that it

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was self-repugnant and contradictory, and because it stated several distinct grounds for suing out an attachment. The court sustained a demurrer to this plea, and its judgment on the demurrer is now assigned as error.

BROTHERS & WILLETT, for the appellant.

PARSONS, PEARCE & KELLY, *contra*.

CLOPTON, J.—In *Johnson v. Hale*, 3 Stew. & Por. 331, it was held, that an affidavit for an attachment is fatally defective, when it states disjunctively two or more grounds. In none of the subsequent cases, has there been any departure from this ruling.—*Watson v. Auerbach*, 57 Ala. 353; *Cannon v. Logan*, 5 Por. 77. In the case last cited, COLLIER, J., says: “The affidavit and writ should disclose but one of the grounds on which the remedy is authorized, or it can not be sustained.” The expression is broad enough to include any affidavit containing more than one ground, whether stated disjunctively or conjunctively. It must, however, be considered as referable to, and explained by the character of the affidavit under consideration, or be regarded as *dictum*. We have no decision in respect to the sufficiency of an affidavit, disclosing two or more statutory grounds, stated conjunctively.

The present affidavit alleges three distinct causes, stated cumulatively each being in substantial compliance with the statute: 1st. That defendant is about fraudulently to dispose of his property; 2d. That he has fraudulently disposed of a part of his property; 3d. That he has money, property, and effects, liable to satisfy his debts, which he fraudulently withholds. In *Drake on Attachment*, § 101, the author observes: “Usually the plaintiff may allege as many distinct and separate grounds of attachment, within the terms of the law, as he may deem expedient. In doing so, the several grounds should be stated cumulatively.” The rule is subject to the qualification, that the alleged grounds are consistent with each other, and that uncertainty in the affidavit shall not occur.—*McCullum v. White*, 23 Ind. 43; *Keith v. Stetter*, 25 Kan. 100; *Klink v. Evans*, *Gardner & Co.*, 36 Ga. 89; *Rosenbaum v. Fifield*, 12 Bradwell, 302. In *Pearce v. Hawkins*, 62 Tex. 434, the principle is thus stated: “That two or more grounds for attachment are set forth in an affidavit is unimportant, unless from the manner of statement the real ground is rendered uncertain, either by the manner in which the several grounds are connected, or by the statement of two or more grounds, which are within themselves inconsistent.” While the practice is objectionable as unnecessary, we discover no valid reason,

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why, if two or more consistent grounds exist, the affidavit may not disclose them; or why the averment of two or more statutory causes should vitiate an attachment, which either of them stated singly is sufficient to sustain. When distinct grounds are stated in the alternative, the real ground is uncertain, as it does not clearly appear which is true; but when coupled conjunctively both are verified. The officer, before issuing the attachment, must require an affidavit, that one of the enumerated causes exist.—Code, § 3255. The statement of one is essential; but there is no express or implied prohibition, that more than one shall be stated, if the debtor by his conduct has created two or more.

It is urged, that if the plaintiff is permitted to state two grounds, he may allege all the statutory grounds; and that the defendant, when he sues on the bond, will be required to negative and prove the falsity of each cause alleged. We do not see the force of the objection. Under our practice, such burden and inconvenience would not be prevented by restricting the affidavit to a disclosure of only one ground. The defendant is prohibited to deny or put in issue in the attachment suit the cause for which the attachment issued; and if wrongfully sued out, he must resort to a suit on the bond.—Code, § 3317. It is true, that the plaintiff in the suit on the bond is required to negative only the ground stated in the affidavit, and give, in the first instance, some evidence of its falsity; but it is a full defense to the action, if any one of the several and distinct statutory causes exist, though only one be stated in the affidavit, and that be disproved, and though some may be inconsistent with the one stated. In such suit, the plaintiff must be prepared to disprove such cause, as the defendant may seek to establish.—*Lockhart v. Woods*, 38 Ala. 631.

In Texas one of the statutory causes is, when the defendant “has disposed of his property in *whole* or in *part* with intent to defraud his creditors.” In *Pearce v. Hawkins*, *supra*, one of the grounds stated in the affidavit is, that the defendants “had disposed of their property with intent to defraud their creditors.” This was held to be inconsistent with the other ground stated, that they had secreted their property. The court must have construed both statements as referring to their entire property. Under our statute—the language of which is—“when the defendant is about fraudulently to dispose of his property,” it is not requisite to a sufficient cause for attachment, that the debtor should be about fraudulently to dispose, or have fraudulently disposed of the whole of his property. An affidavit using the words of the statute is not so construed. A fraudulent disposition of a part may consist with being about fraudulently to dispose of the remainder, or a part thereof, and

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each is consistent with the statement, that the defendant has money, property, or effects, liable to satisfy his debts, which he fraudulently withholds.—*Nelson v. Muncle*, 23 Minn. 229. The repugnancy between the grounds stated must be such, that they can not co-exist, and it must appear upon the face of the affidavit, either expressly or by necessary implication. As the cause for attachment is complete, whether the fraudulent disposition be of the whole or a part of the debtor's property, the general terms of the statute being intended to apply to either case, a construction of the affidavit as necessarily meaning the whole, thus rendering the different grounds inconsistent, would be a disregard of the statutory requirement, that the attachment law must be liberally construed to advance its manifest intent.

The other objection does not seem to be urged. If it were, and it were conceded, that the claim for attorney's fees is for damages for a breach of a contract not certain or liquidated, the entire attachment would not be vitiated, being sued out for the collection of a *debt*, the amount of which is definitely stated.

Affirmed.

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Creditor's Bill in Equity to Set Aside Fraudulent Conveyance, and for Appointment of Receiver.

1. *Sale by insolvent debtor to creditor; validity as against other creditors.*—A sale of property by a failing or insolvent debtor, at a fair and adequate price, in absolute payment of an honest debt, no benefit whatever being reserved to himself, will be sustained by the courts, as a valid exercise of his right of preference, although he thereby disabled himself to pay his other creditors, and may have intended to defraud them; yet, if it were shown that the purchasing creditor knowingly participated and intentionally aided the debtor in other transactions, which proximately preceded his failure in business, it would possibly be different.

2. *Unrecorded absolute conveyance, intended only as security for loan; validity as against creditors.*—A conveyance absolute in form, but intended only as security for a loan, as shown by a bond with condition to convey on payment of the debt, the papers not being recorded, and no change of possession being shown, is constructively fraudulent as against existing creditors; but, as against subsequent creditors, a fraudulent intent, or actual fraud, must be shown.

3. *Same; ignorance of law, as excuse for failure to record; concealment of contents of deed.*—If the creditor, being a resident of Georgia, was ignorant of the fact that the laws of Alabama required registration

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of such conveyance and defeasance, and for this reason failed to have it recorded until after the lapse of nine or ten months, this would be sufficient to rebut any fraudulent intent on his part; nor can he be charged with a fraudulent intent, because the debtor, when acknowledging the conveyance, attempted to conceal its contents.

APPEAL from the Chancery Court of Henry.

Heard before the HON. JOHN A. FOSTER.

The bill in this case was filed by Win. H. Tryon & Co., and others, as creditors of Robt. H. Walker, on the 24th January, 1884. The bill charged that the defendant, Walker, had been carrying on a large mercantile business for a number of years at Columbia, Alabama, and was in possession of and claiming a large amount of property; that, suddenly, on the 24th day of October, 1883, he claimed to have become insolvent, and issued a circular letter to his creditors announcing that fact; that on said date, the said Walker made a general assignment for the benefit of his creditors, a copy of which is made part of complainants' bill, in which he turned over and delivered to one E. C. Thomas, the assignee named in said deed of assignment, property of small value, consisting chiefly of worthless notes and accounts; that said assignee had collected some money out of the assets passing into his hands, but on failure to make a bond had been removed by order of the register, and no one appointed to succeed to the execution of the trust; that the defendant, Walker, claims to have conveyed by deed executed on the 15th of January, 1883, to Flournoy & Epping, a large amount of valuable real estate, described in the bill, which complainants charge was made to hinder, delay or defraud them and the other creditors of the said Walker; that said deed, though purporting to have been made on the 15th of January, 1883, was, in fact, not made until the 25th of October, 1883, and that Flournoy & Epping never knew of its existence till that day; that said conveyance was not probated on the 15th of January, 1883, as it purported to be, but was in truth not probated until the 25th of October following; that said conveyance, while purporting to be an absolute conveyance in payment of a debt of ten thousand dollars, alleged to be due from said Walker to Flournoy & Epping, it was given as a security for a past-due debt of much less amount, and that there was a secret reservation of an interest to said Walker; that it was accepted by Flournoy & Epping with a knowledge of the fraudulent purpose with which it was executed by the said Walker. The bill further alleges that on the 24th of October, 1883, the said Walker was in the possession of a large stock of general merchandise, which he, on said day, claimed to have sold to his father, his brother-in-law and his book-keeper; which sale, it is averred,

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was made for the purpose of hindering, delaying and defrauding complainants and the other creditors of said Walker; that the consideration of said sale was fictitious and was made to secure a secret benefit to said Walker, and that the transferees of said stock of merchandise received the same in fraudulent collusion with said Walker, whom they knew to be insolvent, and was seeking to hinder, delay and defraud his creditors.

The bill charges that these various conveyances were executed at or near the same time, and constitute but one transaction, operating to convey substantially all the property of said R. H. Walker, and prays that the said conveyances be declared a general assignment for the benefit of his creditors. The bill further prayed that the conveyances to Flournoy & Epping, and to F. M. Walker, John A. Hayes and C. E. Walker, the aforesaid father, brother-in-law and book-keeper of said R. H. Walker, be declared void; asks for the appointment of a receiver, to whom the assignee, Thomas, should account; that Flournoy & Epping be enjoined from disposing of the property received by them, and for an account.

The defendant demurred to the bill on the ground of repugnancy, which demurrer was sustained, and the complainants permitted to amend their bill. Answers were then made denying the allegations of the bill and insisting upon the *bona fides* of the conveyances assailed by the complainants. The cause was submitted on pleadings and testimony, and a decree rendered denying complainants' right to relief and dismissing their bill. From this decree of the chancellor complainants take this appeal.

PUGH & MERRILL, McLEROY & COMER, H. D. CLAYTON, Jr., D. C. BLACKWELL and P. A. McDANIEL, Jr., for appellants, cited, *Sims v. Gaines*, 64 Ala. 392; *Seals v. Robinson*, 75 Ala. 372; *Pulliam v. Newberry*, 41 Ala. 168; *E. C. & B. Co. v. Avery*, 38 Am. R. 389; *Hall & Co. v. Renfro Bros.*, 75 Ala. 121; *Pope v. Wilson*, 9 Ala. 694; *Wiley, Banks & Co. v. Knight*, 27 Ala. 336; *Lakins v. Aird*, 6 Wal. 78; *Seaman v. Nolen*, 68 Ala. 463; *Crawford v. Kirksey*, 55 Ala. 282; *Benedict v. Renfro*, 75 Ala. 125; *Hunt v. Rousmariere*, 1 Pet. 1; *Larkins v. Riddle*, 21 Ala. 252; 1 Fonb. Eq. B. 1, ch. 2, § 7, and authorities cited in note V; *Marshall v. Beans*, 12 Ga. 61; *Young v. Lehman*, 63 Ala. 519; *Cook v. Johnson*, 14 N. J. (Eq.) 51; *Croone v. Bivens*, 2 Head (Tenn.), 339; *Thurmond v. Reese*, 3 Ga. 449; *Cotnell v. Radway*, 22 Wis. 260; *Reese v. Bradford*, 13 Ala. 837.

OATES & COWAN, and J. W. FOSTER, *contra*.—1. As to

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Walker, Hayes & Co., and F. M. Walker: The complainants, creditors of R. H. Walker, seek to set aside and declare fraudulent certain conveyances made by R. H. Walker, viz.: a conveyance of goods, wares and merchandise to F. M. Walker, C. E. Walker and John A. Hayes, made on 23d October, 1883; a conveyance of a stock of goods to said F. M. Walker on the 4th of October, 1883, and a conveyance to Flournoy & Epping of certain real estate, made on 15th January, 1883. Complainants allege fraud, and it is alone upon that ground that they rest their right to recover, having amended their bill striking out all averments that said conveyances constitute an assignment. The proof is clear that the debt from R. H. Walker to these defendants was just, and the property conveyed was in payment of said indebtedness, and was sold at a fair valuation. Where a sale is absolute, unconditional and free from all reservation of an interest or benefit in the grantor, in payment of an antecedent debt, it is good in law whatever may have been the condition of the grantors.—69 Ala. 191; 69 Ala. 41; 39 Ala. 60; 68 Ala. 449; 68 Ala. 463; 55 Ala. 382; 50 Ala. 590; 58 Ala. 627; 76 Ala. 103.

2. As to FLOURNOY & EPPING :—A conveyance, absolute on its face, but intended only as a mortgage, or security for a debt, is fraudulent and void as against *existing* creditors without regard to the intention of the parties.—*Sims v. Gaines*, 64 Ala. 392; 21 Ala. 264; 31 Ala. 149. The law confines the operation of this rule to creditors whose demands *exist at the time of such transaction*.—Authorities *supra*; 59 Ala. 612; 62 Ala. 477; 65 Ala. 343. To vitiate the conveyance under which Flournoy & Epping hold, upon the rule above stated, it must appear that complainants' demands *existed* at the date of such deed. Complainants in their bill, set out the date of their respective demands, and they are all *subsequent* to the deed. Therefore, it cannot be contended that complainants were "*existing creditors*" at the date of said deed, or that the same is void under the rule stated above. As to creditors whose demands accrue *subsequent* to the deed, a different rule applies. *Actual fraud* must appear in the transaction else the conveyance is good.—*Seals v. Robinson & Co.*, 75 Ala. 363. And then both grantor and grantee must participate in the fraudulent intent.—*Marshall v. Croom*, 60 Ala. 121; *Warren & Burch v. Jones*, 68 Ala. 499; *Shelly & Finn v. Edwards*, 75 Ala. 411. The instrument being executed and delivered before complainants' debts were contracted, the *onus* is on them to prove the fraudulent intent.—*Buchanan v. Buchanan*, 72 Ala. 55; *Lyne's Admr. v. Wann*, 72 Ala. 43. If the facts and circumstances in evidence are susceptible of an honest in-

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tent that construction will be placed upon them. Courts will not strive to force conclusions of fraud.—67 Ala. 542. In this case there are only two facts which the law takes as badges of fraud: 1st, retention of possession by Walker; 2d, failure to record the deed until after Walker's failure, both of which are explained. In the absence of sufficient explanation, the court, under the rule above, without other and stronger evidence thereof, would not infer fraud. The deed to F. & E., accompanied with a promise to reconvey, is in law a mortgage. This deed or mortgage, taken prior to complainants' demands, was recorded before complainants filed their bill or took any step which could create a lien on the property. The instrument is based on a *bona fide* loan of \$10,000.00. When F. & E. accepted the deed Walker had credit with them to the amount of \$10,000.00 for which he could draw *any time*, and which they, under the contract, were *bound* to pay. He did draw it all. Flournoy & Epping had great confidence in Walker's business capacity, and success in business, and had no apprehension as to the prompt payment of the debt. They thought that they had in Alabama, as in Georgia, twelve months in which to record their deed. They also thought that they were furnishing the entire means which Walker was using in his business outside of his own. Upon these facts, *none disputed*, it is submitted that Flournoy & Epping can not be said to have participated in any wrong or *fraud in fact*—such as must exist in this character of case in order to set aside and vitiate their deed. The facts are *fairly* susceptible of an honest intent, and that construction should be placed upon them.

STONE, C. J.—It is not contended for appellants that they have made a case for recovery as to the stock of merchandise sold and conveyed to F. M. Walker, C. E. Walker and John A. Hayes. This conveyance was made on the eve of R. H. Walker's insolvency, and was an open confession that the latter had failed in business. There is no material conflict in the testimony as to this transaction. The alleged indebtedness of R. H. Walker is shown, and the conveyance was made in absolute payment of such indebtedness. The testimony is that the goods were sold at their reasonable value, and there is an absence of evidence that any benefit was reserved or secured to R. H. Walker, the seller. These facts the testimony establishes, and there is nothing found in the record to overturn or weaken them. On these facts, it is immaterial what private motive may have influenced R. H. Walker's act. There is, under our rulings, no room for fraud in such a transaction, and it must stand. The reasons on which this principle rests have been so often stated we need not repeat them.—*Hodges v. Cole*

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man, 76 Ala. 103; *Crawford v. Kirksey*, 55 Ala. 282; *Flew-ellen v. Crane*, 58 Ala. 627; *Chamberlain v. Dorrance*, 69 Ala. 40. The law allows a failing debtor to prefer and provide for one or more creditors at the expense of others. It therefore allows him, by paying one class in full, to disable himself to pay the others. Even if he intends this, it can not impair the validity of the conveyance, unless he thereby secures to himself some benefit he would not otherwise enjoy.—*Seaman v. Nolen*, 68 Ala. 463.

What is said above is based on the fact that F. M. & C. E. Walker and Hayes were creditors of R. H. Walker in the amounts claimed, and that they bought the goods by absolute purchase and at their reasonably fair value; and an entire want of proof that any benefit was secured to, or trust reserved for the seller. It would possibly be different if the purchasers were shown to have participated knowingly, and aided R. H. Walker intentionally, in the transaction which proximately preceded his failure in business; transactions which, unexplained, leave room for unfavorable comment. In 1882, R. H. & F. M. Walker did business in partnership. In December of that year R. H., the son, purchased the interest of F. M., the father, and became sole proprietor of the business. He agreed to take all the assets, assume all the liabilities, cancel the individual debt of F. M. to the firm—amount not stated—and pay him for his interest three thousand dollars. If they were equal partners, this was an admission that the assets of the firm exceeded its liabilities by six thousand dollars. In addition to this R. H. owned the storehouse, warehouses and other real property, valued by no witness at less than ten thousand dollars. On the pledge of this real estate as a security, R. H. borrowed ten thousand dollars from Flournoy & Epping, and with it, supplemented probably with collections, paid off all liabilities accruing and maturing during the season of 1882-3. The record does not inform us of the extent of business done in 1883, farther than that from some day late in August until October 23, the sales aggregated nine thousand and eight hundred dollars. As cotton was then being marketed, it is reasonable to suppose a considerable proportion of these sales were made for cash, or on short credit. Now, between August 29, and October 20—say, during 53 days—R. H. Walker received in cash and cotton from F. M. & C. E. Walker over nineteen thousand dollars, and paid to and for them only some twenty-six hundred dollars; leaving sixteen thousand and six hundred dollars, excess of receipts in money and property convertible into money, over disbursements made on that, or any other account shown. In this estimate we do not include a payment of thirty-two hundred and sixty dollars made by him to them in wagons and buggies,

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which purport to have been turned over to them by ear load and invoice, as they were received from the manufacturers. Whether those wagons and buggies had been paid for, or their purchase constitutes a part of the claim this suit seeks to enforce, the record furnishes no means of determining.

Without estimating probable receipts from other sources, we have thus traced to him receipts within the two months preceding his failure between sixteen and twenty thousand dollars in money and cotton convertible into money, while his debts maturing November 1, 1883, disclosed by the creditors' bill we have in hand, foots up about ten thousand dollars; and adding to this sum his other paper, as disclosed in the same way, which would mature by January 1, 1884, the whole sum is less than thirteen thousand dollars. Yet, he paid his preferred creditors in merchandise he had bought from others and had not paid for, and we are left to conjecture what became of the large amount of money and cotton we have traced to his hands. It is not mentioned in his assignment.

Another reflection. Flournoy & Epping, as shown by this record, were factors and commission merchants, and for years had been selling R. H. Walker's cotton, handled in his business. He was a merchant of ten years standing. Yet this record shows that R. H. Walker received from F. M. & C. E. Walker more than three hundred bales of cotton in excess of the only thirty-two bales which went forward to Flournoy & Epping. It is common knowledge that warehousemen advance to their customers as a means of increasing their business, and the inference is almost irresistible that the loan of ten thousand dollars from Flournoy & Epping to Walker was made chiefly in the interest of their warehouse business. To what uses was this cotton applied? The record does not inform us.

We have then the case of a merchant who, commencing a new business-year with real estate worth ten thousand dollars or more, merchandise and bills receivable worth six thousand dollars above his liabilities, and an established credit, yet in less than ten months goes into insolvency and makes an assignment of unknown and uncertain value, with no tangible reason given why the disaster fell so suddenly upon him.

We have indulged in these reflections, because they are suggested by the facts shown in the record. It is possible they could be explained, and made to harmonize with honesty of purpose. We will not pronounce unqualified condemnation. But should not the fact of such abhorrent possibilities invite inquiry whether or not a remedy can be provided? Should there not be some restraints on unlimited power of preference? And should the fraudulent withholding or secretion of goods

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be left amenable only to the powerless mandate of a *fieri facias*?

The transaction which we are asked to pronounce fraudulent is R. H. Walker's conveyance to Flournoy & Epping. This was a conveyance stipulated for in December, 1882, and consummated about January 15, 1883. It was in form an absolute conveyance of real estate, including the store-house in which R. H. Walker was doing business, and much other property; the value being ten thousand dollars, or more. This conveyance, although in form absolute, was only intended as security for the repayment of ten thousand dollars, borrowed by Walker from Flournoy & Epping. They gave him a contemporaneous bond to reconvey to him, when the said loan was repaid. These papers were not recorded, nor was there any change of possession until after Walker's failure. On October 26, 1883, the deed from Walker to Flournoy & Epping was filed in the proper office for registration; and possession of the property then passed to the latter. The bond to reconvey is not shown to have been recorded. The contention is, that by failure to take possession, or to give notice by the registration of the deed, Flournoy & Epping committed a fraud on the complainants in this suit, who subsequently trusted Walker on the faith that he continued to be the owner of the valuable real estate he had owned, and which they permitted him to continue to occupy, without visible evidences of changed ownership.

There can be no question that if this conveyance was assailed by creditors whose demands existed at the time it was made, the deed would be pronounced fraudulent as against them, no matter what motive influenced its execution.—*Sims v. Gaines*, 64 Ala. 392; *Seals v. Robinson*, 75 Ala. 363; *Larkins v. Aird*, 6 Wall. 78; *Eaton v. Avery*, 83 N. Y. 31. The present suit, however, is by subsequent creditors. Their demands were the result of purchases made by Walker after he had conveyed to Flournoy & Epping. The Code, §§ 2166, 2167, 2199, 2200, do not in terms apply to this case. To constitute a conveyance fraudulent as against subsequent creditors, there must be an *actual intent* to defraud. Constructive fraud is not enough. See authorities on the briefs of counsel. Both Flournoy and Epping were examined as witnesses, and each testifies that he did not know registration was necessary. They reside in Georgia, and say they thought they were allowed twelve months within which to have the deed recorded—that being the law of Georgia, as they assert. Now, while ignorance of law is no excuse for failing to perform an act of positive, legal obligation, it does exculpate, in such a case as this, from all intentional wrong. To constitute intentional fraud, the failure to record

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must have had its motive in an intention to uphold Walker's credit, or to enable him to obtain goods from others on time, which he would not be likely to do, if the registration were made. It is shown that Walker, when he acknowledged the deed, desired to conceal its contents. This is a suspicious circumstance against him; and if knowledge of it could be traced to Flournoy & Epping, or if there was any proof tending to show that the latter were informed he wished to conceal the fact of such conveyance, this would possibly justify us in holding them participants in his fraud. There is no such testimony. Presuming, as we must, that the chancellor properly weighed the testimony, and came to correct conclusions of fact, there is not enough in the record to convince us clearly that he erred; and in the absence of such conviction, we must affirm his decree.—*Rather v. Young*, 56 Ala. 90; *Nooe v. Garner*, 70 Ala. 443.

Affirmed.

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Action for Breach of Special Contract of Employment.

1. *Actions consolidated by order of court.*—When several actions are pending at the same time, in the same court, and between the same parties, for alleged breaches of the same continuing or unrescinded contract, they may be consolidated (Code, § 3024) by order of the court.

2. *Election of remedies by discharged employee.*—When a servant, or other person employed, is discharged without legal cause, before the expiration of the stipulated term, he has an election of remedies: 1st, he may treat the contract as rescinded, and sue on a *quantum meruit* for work actually performed; 2d, he may sue for a breach of the contract, and recover damages for the breach up to the time of the trial; or, 3d, he may wait until the expiration of the stipulated term of service, and sue for the agreed wages for the entire term.

3. *When action brought for separate installments; when for entire term.* If the wages are payable in installments, monthly or otherwise, the plaintiff may bring a separate action for each installment as it falls due; but if the action is not brought until after the expiration of the entire term, or if the entire term expires before the trial, the measure of damages is, *prima facie*, the stipulated wages for the entire term.

4. *When defendant may reduce amount of plaintiff's recovery.*—The defendant may, without regard to the form of action, reduce the amount of the plaintiff's recovery, by showing that, after his discharge, he obtained other employment, or might have obtained it by the exercise of reasonable diligence; but, though the plaintiff, suing on the contract, and claiming the entire wages for the term, is required to aver his readiness and willingness to perform, his right of recovery can not be defeated by showing that he engaged in other business during the residue of the term. (Overruling *dictum* in *Holloway v. Talbot*, 70 Ala. 392.)

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5. *Nature of employment plaintiff required to accept.*—The plaintiff is not required to accept an offer of other employment, unless it is of the same general nature as that from which he was discharged, and in the same neighborhood.

APPEAL from Butler Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

This action was brought by Francis M. Black against W. W. Wilkinson for the recovery of damages alleged to have been sustained by the plaintiff, by reason of his wrongful discharge from the service of the defendant, and was commenced October 7th, 1884. The contract under which plaintiff claims is in the following words: "This agreement entered into between F. M. Black and W. W. Wilkinson, witnesseth, that F. M. Black, of the first part, agrees to attend to all the business, such as collections, &c., that may be placed in his hands for collection by W. W. Wilkinson, or agent, and to do all he can to promote the interest of Wilkinson; the said Wilkinson on the second part to pay said F. M. Black eight hundred dollars for his services one year, commencing October 1, 1883, and ending September 30, 1884, to be paid monthly, \$75.66 $\frac{2}{3}$ per month for winter months, commencing September, and \$58.33 $\frac{1}{3}$ for summer months: the said Wilkinson is to furnish money to pay all necessary expenses for collection travelling on such business.

W. W. WILKINSON, (L. S.)

H. Z. WILKINSON.

F M. BLACK, (L. S.)"

The plaintiff alleged that he entered upon the discharge of his duties under the contract, but that the defendant discharged him on the 13th of November, 1883, without cause, and without fault on plaintiff's part, owing plaintiff for the months of April, May, June, July, August and September, 1884. A number of separate suits were brought by the plaintiff against the defendant for the recovery of what was claimed to be due for each of said months; but by order of court, these various suits were consolidated; to which action of the court the defendant excepted, assigning as grounds of objection, that three of the cases were appeals from a magistrate's court, and one of them was commenced originally in the Circuit Court; that one of these suits was for damages for a breach of the contract therein set out, and the others claimed a specific performance under the contract; that the suits were inconsistent and could not be joined.

In view of the decision of this court upon the rulings of the court below on questions of evidence, it would seem unnecessary to set out the testimony offered in the Circuit Court. The charges given announced the principles involved in the con-

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tention which are embodied in the opinion of this court and receive its approval.

There was a verdict for the plaintiff, and the defendant takes this appeal, assigning as error the adverse rulings of the court below.

GAMBLE & RICHARDSON, for appellant.

BUELL & LANE, *contra*. (No briefs came into the hands of the Reporter.)

SOMERVILLE, J.—The several suits were properly consolidated, under the provisions of section 3024 of the present Code. They were all pending at the same time, between the same parties, in the same court, and were of such a nature as that they could have been joined. Each was an action *ex contractu*, having been brought on an agreement for the payment of money.—Code, 1876, § 2986. No one of these actions, moreover, recognizes the contract of service between the plaintiff and defendant as rescinded, or abandoned on the part of the plaintiff, but rather as a subsisting contract of which the defendant has been guilty of a breach.

When a servant or employee has been discharged from service without a sufficient legal excuse, before the expiration of his term, the rule as to his choice of remedies is not free from confusion under the authorities. The following principles, however, we deem to be settled: (1.) He may elect to treat the contract as rescinded and entirely abandoned, and sue on a *quantum meruit* for work actually performed; or (2.) He may at once sue for a breach of the contract by the defendant and recover damages for such breach up to the date of trial; or (3.) He may wait until the expiration of the term of service, and sue for the stipulated wages agreed to be paid for the whole term.—*Strauss v. Meertief*, 64 Ala. 299, and cases cited; *Holloway v. Tulbot*, 70 Ala. 389; *Decamp v. Hewitt*, 43 Amer. Dec. 204, and *note*; 2 Add. Contr. § 897; Wood on Master and Servant, pp. 237, 250, § 125.

If the plaintiff's wages are payable in monthly installments, the rule settled in this State is that he may, if he so elects, bring a separate suit for each installment as it falls due.—*Davis v. Preston*, 6 Ala. 83; *Strauss v. Meertief*, *supra*; *Fowler v. Armour*, 24 Ala. 194.

Where the suit is brought after the expiration of the term of service, or such term has expired at the day of trial, the measure of damages, *prima facie*, would be the wages agreed to be paid according to the terms of the contract.—Wood on Master and Servant, 238; *Fowler v. Armour*, 24 Ala. 194;

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Everson v. Powers (89 N. Y. 527); s. c. 42 Amer. Rep. 319. This is the rule, however, only where the facts of the case in evidence fail to rebut the presumption that the plaintiff has sustained an actual loss equal to this sum.

But it is permissible for the defendant to show, in order to reduce this *prima facie* amount of recovery, that the plaintiff obtained, or could have obtained other employment by the exercise of reasonable diligence on his part; and the burden of proving these facts rests on the defendant.—*Strauss v. Meertief*, *supra*; *Massey v. Taylor*, 5 Cold. (Tenn.) 447; 2 Greenl. Ev. § 261 *a*. We take this to be the proper rule whatever may be the nature of the action. It is true that where the plaintiff elects to sue upon the contract, averring his readiness at all times to perform, there seems to be a logical repugnancy in the idea that he must seek other employment, in as much as to be always strictly ready he must be always idle. This difficulty originates in the doctrine of constructive service, which is a mere fiction of the law according to which a tender and readiness to perform is regarded as tantamount to actual performance, and entitling the plaintiff in all proper cases to a recovery of the contract price as the absolute measure of his damages. The doctrine, can not, however, be followed to its logical consequences, and has been abrogated in most of the States, and modified in others. The averment of a readiness to perform, therefore, by the plaintiff is not to be taken as absolutely true in all cases, but true only *sub modo* and for the purpose of sustaining the action.—*Decamp v. Herriot*, 43 Amer. Dec. 203, *note*; Wood on Master and Servant, p. 239. It has been observed of the rule that it is *quasi* performance, but it does not regulate the amount of damages.—1 Sedgw. on Dam. (7th Ed.) 450–51. It can not, therefore, be permitted to override a rule of public policy, favoring industry and striking at idleness, by which it is made incumbent on the injured party to do what he reasonably can to lessen the injury suffered by him. As said in *Strauss v. Meertief*, 64 Ala. 308, *supra*, “neither good morals, nor the law, will countenance him in persisting voluntarily in idleness, that the amount of his recovery from the defendant may not be diminished.” To permit this would be to superadd a fraud to a moral vice, which it would be more honorable in the law to punish than to countenance.—*Shannon v. Comstock*, 21 Wend. 457; *Howard v. Daly*, 61 N. Y. 362. The mere act of engaging in other business can not operate to entirely defeat the plaintiff’s right of recovery by negating the fact that he kept himself in readiness to perform his contract of service. True, there is a *dictum* to this effect in *Holloway v. Talbot*, 70 Ala. 392, but it is manifest that the two principles are inconsistent. It would

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be absurd for the law, in one breath, to require the plaintiff to seek other employment, and, in the next, to declare his right of action defeated for obeying its mandates.—*Howard v. Daly*, 61 N. Y. 362.

The plaintiff is not required to accept any kind of employment, but only such as is of the same kind or general nature with that from which he was dismissed—of equal grade, and not of a more menial or onerous kind.—*Strauss v. Meertief*, 64 Ala. 299; *Wolf v. Studebaker*, 65 Pa. St. 459. Nor is he compelled, under this rule, to go into a different neighborhood or community.—*Howard v. Daly*, *supra*; *Gillis v. Space*, 63 Barb. 177. The fact, and peculiar locality and circumstances under which employment is sought, may, no doubt, tend in some cases to prove an assent on the part of the plaintiff to the rescission or abandonment of the contract, but the question of intention in these cases is clearly for the determination of the jury, in most cases.

The rulings of the court are susceptible of an interpretation in harmony with the foregoing principles, and are free from error.

The exceptions to the rulings on the evidence are, in our opinion, not well taken. We have also examined the charges of the court, not particularly considered, and are satisfied that they are also free from error.

The judgment is affirmed.

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Creditor's Bill to Have Mortgage Declared a General Assignment.

1. *Right of surviving member of insolvent partnership to make an assignment.*—The surviving member of an insolvent partnership may make an assignment for the equal benefit of all the creditors; but his power to mortgage the partnership effects, thereby giving the mortgagee a preference over other creditors, is a question which is worthy of consideration, and which is not decided.

2. *When a partnership creditor becomes the creditor of the surviving partner.*—When a partnership creditor surrenders the partnership note, and accepts the individual note of the surviving partner, granting an extension of the day of payment, and taking a mortgage as security, he ceases to be a partnership creditor, and becomes the individual creditor of the surviving partner.

3. *The creditors of a partnership can not claim under and against a mortgage.*—If the mortgage recites the substitution of the new note, and the surviving partner's individual ownership of the property conveyed,

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the other partnership creditors can not have it declared and foreclosed as a general assignment enuring to their equal benefit, by alleging that the partnership in fact owned an undivided interest in the property, which constituted all of its assets. They can not claim under and against the conveyance.

4. *Bill in equity ; remedy of partnership creditors.*—If the partnership in fact owned an interest in the property conveyed by the mortgage, the remedy of the partnership creditors is a bill in equity founded on the dissolution and insolvency of the partnership, the insolvency and misapplication of the funds by the surviving partner, seeking to set aside the uses of the mortgage, and to have the assets marshalled and appropriated according to equitable principles.

APPEAL from the Chancery Court of Barbour.

Heard before Hon. JOHN A. FOSTER.

The bill in this case was filed in February, 1885, by John S. Espy in his own behalf, and for such other creditors of Clark, Hart & Co. as should join in said suit, against Hugh M. Comer, as surviving partner of Bates & Comer, Henry C. Hart and others ; and prayed that a mortgage executed by said Hart to said Comer be declared a general assignment for the benefit of all the creditors of the partnership of Clark, Hart & Co., of which said Hart was a member.

The bill avers that on the 22d day of February, 1881, Henry C. Hart, as surviving partner of said firm of Clark, Hart & Co., executed and delivered to Hugh M. Comer, as surviving partner of Bates & Comer, his three promissory notes for the aggregate sum of \$19,227.08, and to secure said notes executed a mortgage on the Chattahoochee warehouse, with other real estate. It is charged that said warehouse was the partnership property of said Clark, Hart & Co., and that said debt was an antecedent debt, and not contracted at the time of the execution of the mortgage ; that said mortgage created a preference in favor of said H. M. Comer, was substantially all the property of said partnership of Clark, Hart & Co., and that said mortgage was a general assignment enuring to the benefit of orator and the other creditors of said partnership.

Complainant was a creditor of Clark, Hart & Co., holding their certificate of deposit for \$14,320.38, made May 21, 1878, which had not been paid. It was averred that the estates of each member of said firm were insolvent.

The bill further alleges that under power of sale contained in the mortgage made by Hart to H. M. Comer, the said Comer advertised and sold said warehouse property on the 16th of November, 1883, and at said sale himself became the purchaser ; and prays that said sale be declared void. The bill also asks for the appointment of a receiver.

Defendants demurred to this bill on the grounds : 1. That the said H. C. Hart had no right in law or equity, as one of the

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surviving partners of Clark, Hart, & Co., to execute the mortgage sought to be declared a general assignment, the other surviving partner not joining therein. 2. That one of two surviving partners of a firm, can not, by executing a mortgage in his own name on partnership real estate, make a general assignment. 3. That before the commencement of this suit, the mortgage had been foreclosed, and has no existence, and is no lien or that complainant seeks to have declared a general assignment, security on or against said property.

The chancellor sustained No. 3 of these demurrers, and gave complainant thirty days in which to amend his bill. Complainant declined to amend, and his bill was dismissed for want of equity. From the action of the court in sustaining the demurrer, and for dismissing his bill, complainant appeals.

PUGH & MERRILL, for appellant.

G. L. COMER, for appellees.

CLOPTON, J.—On the dissolution of a partnership by the death of a member, the legal title, possession, control, and disposition of the personal assets devolve on the survivor, for the purpose of paying the debts, settling its affairs, and distributing the surplus. He is regarded as occupying the relation of trustee for all interested—for the creditors, for himself, and for the representatives of the deceased—and possesses such powers as will enable him to execute the trust. If realty constitutes a part of the partnership property, the legal title to the deceased partner's interest descends at law to his heirs; but in equity it is treated, in many respects, as personal estate, and as subject to the disposition of the survivor, so far as may be necessary to the payment of the debts, and the adjustment of the partnership accounts.—*Espy v. Comer*, 76 Ala. 501. In *Andrews v. Brown*, 21 Ala. 437, it is substantially held, that though the surviving partner can not by his legal deed pass the legal title, yet as he is charged with the duty of paying the debts, he may mortgage the real property, and convey an equity, through which the heir may be compelled to convey the legal title. In *Lang v. Waring*, 25 Ala. 625, the rule thus broadly asserted is explained and modified, and the power of the surviving partner to mortgage the real estate is doubted. Expressing no intention to affirm the correctness of the former decision, it was held, that if the authority to mortgage was conceded, it is subject to confirmation by a court of equity, and unless the conveyance is such, as the court would have ordered or sanctioned if made under its own direction, it will not be upheld, nor the heir divested of the legal title. While the surviving member

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of an insolvent partnership may make an assignment, just in all respects, and for the equal benefit of all the creditors, his power to give a preference to some of them, by a mortgage of partnership effects, is a question worthy of consideration, in view of its inconsistency with the equality generally observed in marshalling the assets of insolvent partnerships, and with the policy of our legislation in respect to general assignments, and the requirement of *pro rata* distribution in insolvent estates.—*Hutchinson v. Smith*, 7 Paige, 26. But this question we leave undecided, as the exigencies of the case do not necessitate its decision.

The bill is a creditors' bill, brought by complainant on behalf of himself and the other creditors of Clark, Hart & Co. The purpose is, to have a mortgage executed by Hart to Comer in February, 1881, declared a general assignment, so far as relates to a part of the real estate embraced therein, which for convenience may be designated the warehouse property. Clark died in 1875, leaving Drewry and Hart surviving partners, the latter of whom had, during the existence of the partnership and after its dissolution, sole control and management of its affairs. The allegations of the bill show sufficiently, that the warehouse property belonged to the partnership, constituting the larger part, if not the whole of the capital. It does not appear in whom the legal title was vested, whether in the firm or in the members as tenants in common. The bill further alleges the insolvency of the firm, of Drewry, and of the respective estates of Clark and Hart, who have since died; and that the warehouse property was substantially all the property of Clark, Hart & Co., at the time of the execution and delivery of the mortgage.

The rights of the parties depend on the question whether, on the allegations of the bill, the mortgage comes within the purview and operation of the statute, which declares: "Every general assignment, made by a debtor, by which a preference or priority of payment is given to one or more creditors, over the remaining creditors of the grantor, shall be, and enure to the benefit of all the creditors of the grantor equally."—Code, § 2126. The policy of the statute is to prohibit discriminations between creditors, by withdrawing from a debtor the power to give preferences to one or more to the exclusion of the others. Whatever may be the form of the judgment, whether an assignment, or a mortgage, or other transfer as security for his debt, if it conveys substantially all of the debtor's property not exempt from the payment of debts, and gives preference or priority of payment, it falls within the statute. It may be, that a transfer of substantially all the partnership effects by a *firm*, giving preference to one or more

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creditors, is within the equitable construction and spirit of the statute, and enures to the benefit of all the firm creditors equally to the exclusion of the separate creditors. Conceding this, the inquiry remains, does the statute, in letter or spirit, include a mortgage, executed by a surviving partner in his own name, as security for his individual assumption of a debt of the partnership, which conveys real estate, declared therein to be owned individually by the grantor, but a part of which in fact belongs to the partnership and constitutes substantially all the property which the firm owned, but not transferring all of the separate property of the grantor? Is such mortgage, under the statute, a general assignment, so as to enure to the benefit only of the partnership creditors, to the extent of the partnership property? In determining this inquiry, we shall consider the character and effect of the arrangement under which the mortgage was given, and of the mortgage, which is made an exhibit to the bill, as shown by its statements and the purposes apparent on its face; no fraud, misrepresentation, or mistake being alleged; and shall omit any consideration of the fact, that Drewry, the other surviving partner, did not join in its execution; as he virtually ratified it, by subsequently making to Comer a quit-claim deed to his interest.

Clark, Hart & Co. were indebted to Comer, as surviving partner of Bates & Comer, in a large sum. At the time of the execution of the mortgage, Hart assumed the firm indebtedness; took up the notes and acceptance of Clark, Hart & Co. by which it was evidenced; gave his individual notes for the amount, with an extension of the times of payment; and made the mortgage to secure their payment, without any reference to his relation and authority as surviving partner, other than a recital that the purpose of the mortgage is to secure the payment of a debt, for which the mortgagor is liable as a member of the firm, and which he had assumed—a mere statement of the consideration of his individual notes. If the notes had been given by Hart as surviving partner, in renewal and extension of the original debt, they would not be binding on the other partners; though, in such case, the mortgage might be regarded in equity as security for the partnership debt, if otherwise just and equitable.—*Myatts & Moore v. Bell*, 41 Ala. 222; *Lang v. Waring*, 17 Ala. 145. But by the arrangement Hart, as an individual, assumed the partnership debt; the firm obligations were surrendered, and his notes accepted in payment. The partnership debt was converted into a separate demand, and Comer did not thereafter occupy the position of a creditor of the firm, having a claim to the rights and equities of such creditor. He became and was the separate creditor of Hart.—*Bank of Mobile v. Dunn*, 67 Ala. 381.

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The mortgage is executed by Hart in his own individual name. The warehouse property is described as *formerly* owned by Clark, Hart & Co., but is declared in the mortgage to be Hart's separate property, having the legal title to four-fifths, and the equitable right to one-fifth interest therein; and is mortgaged as *such* with covenants of warranty, except as against a prior mortgage. The other real estate conveyed is the separate property of Hart. The mortgage, then, is made by Hart as an individual,—not in his capacity as surviving partner, and does not purport to convey partnership property, or any interest therein. Hart asserts entire ownership of the lands and conveys them as his separate property, and as security for the payment of his individual notes. The statute does not annul general assignments creating preferences; but preserves them for the benefit of all the creditors equally, merely annulling the preferences expressed.—*Danner v. Braver*, 69 Ala. 191. On the case made by the bill, the complainant seeks to sustain the mortgage as valid and legal, and elects to claim under it, only asking the enforcement of the trust, which the statute creates for the benefit of creditors. Admitting that the warehouse is in fact partnership property, nevertheless the grantor declares it is separate, and not partnership property. Claiming under it as a general assignment, the complainant can not “repudiate it so far as it passes rights to others which are inconsistent with independent, distinct rights to which he may be entitled.” Though he may have an equity, as a partnership creditor, founded on rights independent of the mortgage, he can not elect to accept the rights and benefits it confers, and, at the same time, have its uses set aside, and the property appropriated to other and different uses.—*Moog v. Talcott*, 72 Ala. 210; *Hatchett v. Blanton*, 72 Ala. 425. The complainant, claiming under, and asserting rights derived from the mortgage, is bound by its terms, and is estopped to deny the ownership and title of the mortgagor, as recited therein. The statute declares the uses, and the mortgage should be read and interpreted, as if the statutory words,—“shall be and enure to all the creditors of the grantors equally”—were incorporated. Had the grantor conveyed, professedly and in terms, a part as partnership and a part as separate property, being substantially all belonging to the firm, and giving preference to a former creditor, it may be, that, on the equitable principle governing the appropriation of the assigned property to the respective classes of creditors, the mortgage would in equity be regarded as a general assignment in respect to the partnership property, enuring to the benefit of all the firm creditors. But if the mortgage is illegal, as an unauthorized preference between partnership creditors under a pre-

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tended claim of individual ownership, or a fraud upon their rights, or a breach of the trust devolved by law on the surviving partner; the complainant should apply to vacate it as to the partnership property, instead of coming in under it as a creditor, to whose benefit it enured. The remedy in such case, is a bill founded on the *quasi* lien of partnership creditors, arising in cases of dissolution by death, the supervenient insolvency of the surviving partner, and his mismanagement and misapplication of the funds—not to have the mortgage declared a general assignment, but to vacate its uses, and have the assets marshalled and appropriated on the prevailing rules of equity, asserting rights independent and exclusive of the mortgage.

When a partner conveys, in his individual name, partnership property, the conveying instrument only passes his interest, remaining after the payment of the debts, and equalization of the accounts. If the warehouse is in fact partnership property, the mortgage only transfers Hart's interest therein, and the mortgagee took it subject to the equities of the firm creditors, which they may enforce, as in the analogous case of the sale of a partner's interest under execution at law.—*Farley v. Moog*, 79 Ala. 148. Had there been averment and proof that the mortgage conveyed substantially all the property of Hart, we think, that under the broad language of the statute, it would enure to the benefit of his separate creditors, and the creditors of the *insolvent* partnership equally.—*Bank of Mobile v. Dunn*, 67 Ala. 381. Without such allegation the bill is without equity.

Affirmed.

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Action on Detinue Bond; Plea of Set-Off.

1. *A waiver by landlord of lien for current year no waiver of other lien.* A waiver by a landlord, of his lien, in favor of another, for advances to be made his tenants to enable them to make a crop the current year, does not operate a waiver of the landlord's lien in favor of an antecedent debt of the tenant, except by consent of the landlord.

APPEAL from the Circuit Court of Bullock.

Tried before the Hon. H. D. CLAYTON.

This action was brought by appellant against appellee to recover damages on a detinue bond. To that suit appellee

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put in a plea claiming a set-off which is fully set out in the opinion of the court. On the trial of the cause, the court, at the request of defendant, gave, among others, the following charge: "That if Napier waived his landlord's lien on Sydney Jones and hands' crops, in favor of Foster, and that Sydney Jones and hands agreed that the account of Vol. Ryas should be included in the account by the consent of Sydney Jones and hands, then Sydney Jones and hands' mortgage covered all the items in the account introduced as evidence; and whether Napier knew of or assented to the Vol. Ryas account being in the account against Sydney Jones and hands would make no difference, unless the waiver by Napier, if made, was upon condition that Foster would advance articles of certain other character." To the giving of this charge plaintiff excepted, and assigns the same as error.

J. T. NORMAN, and H. C. TOMPKINS, for appellant.

FEAGIN, CUNNINGHAM, and WATTS, for appellee.

STONE, C. J.—Sydney Jones and hands were tenants on the lands of George C. Napier for the year 1879, under a contract to pay him five hundred dollars rent. With the knowledge and approbation of Napier they agreed with Foster, a merchant, to advance supplies to them to enable them to make a crop for that year, and entered into a written agreement, note or crop lien, in which it was recited that said advance was obtained *bona fide* to enable them to make a crop in the year 1879, without which it would not be in their power to procure the necessary team, provisions and farming implements to make a crop. They also gave a mortgage on the crop and on a mule to secure such advances, and these instruments were properly recorded. To induce Foster to make these advances, Napier agreed with him, among other things, to waive in his favor the landlord's lien for rent, to the extent of five hundred dollars to be advanced. There is no material discrepancy in the testimony up to this point. The contracting parties differ in this: Napier's version of the contract is, that his waiver was given on the condition and agreement that Foster would advance up to the sum of five hundred dollars, and that he stopped short of that sum; thus leaving Napier to continue to supply them from his own means and resources. Foster testified he was to furnish no particular sum, but it was not to exceed five hundred dollars. No legal question is raised on this discrepancy. When the crop was gathered, Napier got possession of it, sold it, and converted the proceeds to his own use—some five hundred dollars—and Foster received nothing.

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In a suit by Napier against Foster on a moneyed demand, the latter relied on the foregoing claim as a set-off to the extent, about five hundred dollars, he alleged he had furnished Jones and hands under said contract. One item of the account thus claimed as set-off was as follows: One Ryas, a laborer, was indebted to Foster in the sum of sixty one and 50-100 dollars, on a past transaction. Jones desired to employ Ryas as a laborer in his crop, but could not do so unless he would assume the Ryas debt, and consent to make it part of the advance he was to receive from Foster. This was agreed to, and this item constituted part of the account he claimed in set-off. Napier swore this arrangement was made without his consent, while Foster testified it was with Napier's knowledge and consent. The court, at Foster's request, charged the jury that if this arrangement was made and agreed upon between Foster and Jones and hands, it made no difference whether Napier knew of or assented to it or not; the mortgage of Sydney Jones and hands would cover it, if Napier waived his landlord's lien in favor of Foster. In this the Circuit Court erred. *Marcus v. Robinson*, 76 Ala. 550.

We can not perceive that charge four injured appellant, and hence we need not pronounce on its correctness.

Reversed and remanded.

Lawson et al. v. Alabama Warehouse Company.

Bill in Equity to Set Aside Mortgage as Fraudulent.

1. *Fraud*.—On the facts shown by the record, the court so far concurs with the chancellor in the conclusion that the mortgage attacked for fraud is not shown to have been executed with any fraudulent intent on the part of the mortgagor; or, if it was, that the mortgagee participated in such fraudulent intent.

2. *False recital a badge of fraud; may be explained*.—But a false recital in a mortgage, as to the consideration, or indebtedness intended to be secured, is only a badge of fraud, and is susceptible of explanation; and where the indebtedness is recited to be \$5,000, as in this case, but it is shown that \$2,800 only was loaned at the date of the mortgage, and the residue (\$2,200) was to be advanced at times, and in sums, to suit the mortgagee's convenience, this is a sufficient explanation, and relieves the instrument of any imputation of fraud.

APPEAL from the Chancery Court of Pike.

Heard before Hon. JOHN A. FOSTER.

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The bill in this case was filed by appellee, the Alabama Warehouse Company, against U. L. Jones and John R. Lawson, and seeks to have declared a mortgage executed by said Jones to Lawson fraudulent as to complainant.

The bill sets out that U. L. Jones became indebted to the Alabama Warehouse Company in August, 1872, for one thousand dollars, money borrowed; that this debt was reduced to judgment at the October term, 1874, of Pike Circuit Court, execution issued, and returned "no property;" that on the 11th of October, 1873, U. L. Jones executed a mortgage to appellant, John R. Lawson, to secure an alleged indebtedness of five thousand dollars due from said Jones to Lawson, due and payable on the 11th day of December, 1874, conveying in the mortgage certain real estate in the town of Troy. The bill charges that the property contained in said mortgage constituted all the available property belonging to said U. L. Jones that could be reached by execution at law; that the property conveyed was worth about twelve thousand dollars; that Jones was in failing circumstances; that there were a number of judgments, at the time, against him, and that these facts were known to Lawson at the time of the execution of the mortgage; it denies that Jones was indebted to Lawson in the sum of five thousand dollars, as alleged in said mortgage, which was executed for the purpose of hindering and delaying the creditors of said Jones. The bill prays that the mortgage be declared void, and the property embraced therein be declared subject to the debt of complainant. The proof showed that the alleged indebtedness of five thousand dollars was not actually due to Lawson, but that a part of said sum was advanced by Lawson to Jones at the time of the execution of the mortgage, about \$2,800, and an agreement to advance the remainder in sums, and at times, to suit the convenience of said Jones; and that all of the five thousand dollars, except about three hundred and fifty dollars, had been in fact advanced to Jones by Lawson.

Upon submission, the chancellor declined, upon the evidence, to declare that the mortgage was executed "with the intent" to hinder, delay or defraud the creditors of the mortgagor, but held that the ostensible consideration being five thousand dollars, actually paid, when, in fact, there was only an agreement to pay, as to a large part of said sum, showed a secret reservation for the benefit of the grantor, that could not be upheld, and rendered a decree vacating said mortgage as to complainants' debt. From this decree defendant Lawson appeals, as signing said decree as error.

W. H. PARKS, and RICE & WILEY, for appellants.

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N. W. GRIFFIN, for appellee.

SOMERVILLE, J.—We concur in the conclusion reached by the chancellor, in so far as he holds that the testimony fails to show satisfactorily that the mortgage in controversy, which was executed by Jones to Lawson, on the 11th day of October, 1873, was made with any intention to hinder, delay or defraud the creditors of the grantor, or, if it was; that this fraudulent intent was participated in by the grantee. It is needless that we should attempt any review of the testimony bearing on this point.

But we can not concur in the other view expressed in the chancellor's opinion, in which he construes the conveyance to be one containing a secret trust for the benefit of the grantor. This conclusion is based solely upon the fact that there is a false recital of the consideration of the mortgage, or of the amount intended to be secured. The amount of indebtedness is stated to be five thousand dollars, due and payable on the 11th day of December, 1874. It is shown, in truth and in fact, to be only the sum of two thousand eight hundred dollars actually loaned at and before the date of the mortgage, and of two thousand two hundred dollars agreed to be loaned or advanced, at times and in amounts to suit the mortgagee's convenience.

The case is clearly not one of a simulated consideration, where the debt secured is intentionally recited to be larger than it really is. If this were so, the conveyance would be void for fraud, as in *Hall v. Heydon*, 41 Ala. 242. The rule is settled to be that false recitals of indebtedness in a mortgage, by exaggeration of the amount, are only *prima facie* evidence of fraud, and this presumption may be rebutted by showing fairness of intention on the part of the mortgagee. In other words, it is a mere badge of fraud, susceptible of explanation. This was decided in *Stover v. Herrington*, 7 Ala. 142, and the principle is elsewhere so recognized. This case was based on the decision of Chief-Justice MARSHALL, in *Shirras v. Craig*, 7 Cranch, 34, where the mortgage purported on its face to secure a debt of £30,000 sterling due to all the mortgagees. It was really intended to secure different sums due at the time to particular mortgagees, advances afterwards to be made, and liabilities to an uncertain amount. The court said: "It is not to be denied that a deed which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is certainly always advisable fairly and plainly to state the truth. But if upon investigation the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming

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under the deed, of his real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation." In *Summers v. Roos & Co.*, 42 Miss. 749; s. c. 2 Amer. Rep. 653, the objection was urged, as here, that the mortgage on its face purported to secure advances already made, while in fact it was really intended to secure future advances as well as advances already made. The authorities are cited and reviewed showing the objection to be unavailing in every sound point of view. The present case, in our opinion, seems scarcely to be distinguishable from *Lovelace v. Webb*, 62 Ala. 271. There the mortgage recited, as one of the debts secured, the sum of three hundred dollars advanced on the day of the execution of the instrument, to enable the mortgagor to make a crop. The proof showed that the sum was not then advanced, but there was merely a verbal agreement that it should be advanced, as it ultimately was during the year. This was held to be sufficient constructive notice of the prior right, duty and liability of the mortgagees, and the validity of the instrument was accordingly sustained, the consideration proved being equally valuable and valid with the one recited. As said in *Collier & Son v. Faulk et al.*, 69 Ala. 58, "all that can be required is, that a mortgage designed to secure such future liabilities should describe the nature and amount of them with reasonable certainty, so that they may be ascertained by the exercise of ordinary diligence on proper inquiry." The recital of the specific sum as already due was certainly sufficient to put subsequent purchasers or incumbrancers on inquiry. 1 Jones on Mort. §§ 364-367; *Driver v. McLaughlin*, 20 Amer. Dec. 661, *note*.

There is nothing in this case which brings it within any principle laid down in *Sims v. Gaines*, 64 Ala. 392.

The chancellor erred in holding the mortgage in question to be void for fraud, and his decree is for this reason reversed, and the cause will be remanded.

CLOPTON, J., not sitting.

[Clark v. Spencer et al.]

Clark v. Spencer, et al.

Petition to Vacate and Set Aside Sale of Land Under Execution Issued on Money Decree.

1 *Interlocutory decree from which appeal lies ; what is not.*—The overruling of a demurrer, to a petition to set aside a sale of land under execution, no other order being made in the case, is not one of the interlocutory decrees from which an appeal is given by statute (Code, §§ 3916, 3918, 3921-2) ; and an appeal from such decree will be dismissed, *ex mero motu*, by the court.

APPEAL from the Chancery Court of Greene.
Heard before the Hon. THOMAS COBBS.

G. B. MOBLEY and THOS. R. ROULHAC, for appellant.

CLOPTON, J.—The interlocutory decrees and orders of the Chancery Court or Chancellor, from which the statutes authorize an appeal, are those sustaining or overruling a demurrer or a plea to a bill in equity, or a motion to dismiss such bill for want of equity, or sustaining or dissolving injunctions, or appointing a receiver. If the decree is not of either of the enumerated classes, it must be final before an appeal lies.—Code, §§ 3916, 3918, 3921, 3922. The present proceeding is a petition to set aside and vacate a sale of land under an execution issued on a money decree. The appellant demurred to the petition. The court overruled the demurrer, and allowed the appellant thirty days in which to answer the petition, without making any disposition of the costs, or any further order in the case. From this decree the appeal is taken. It is not a final decree ; neither is it an interlocutory decree or order, from which an appeal can be taken. Without statutory authority, this court can not take jurisdiction of such appeal. Consent can not confer it, and to entertain it would be usurpation. We are constrained to dismiss the appeal, *ex mero motu*.—*Parrish v. Galloway*, 34 Ala. 163 ; *Hightower v. Kennedy*, 11 Ala. 562.

Guy v. Lee.*Motion to Dismiss Appeal.*

1. *Appeal by married woman, without security for costs.*—From any judgment or decree “subjecting to sale the separate estate of a married woman, or any part thereof,” she may prosecute an appeal without giving security for the costs, on making an affidavit of her inability to do so (Code, § 3930); but the statute does not apply, where a married woman institutes a statutory claim suit to try the right to property on which an execution against her husband has been levied, and the issue is found against her.

APPEAL from the Circuit Court of Colbert.
Tried before the Hon. HENRY C. SPEAKE.

The opinion states the facts.

CLOPTON, J.—With the submission of the cause, a motion was also submitted to dismiss the appeal, on the ground that no security for the costs of appeal was given.

The appeal is taken by a married woman, without giving security for the costs, on affidavit that she is unable to give such security; and is from a judgment of the Circuit Court, condemning for the satisfaction of plaintiff's judgment property to which she interposed a claim under the statute. Section 3930 of the Code provides, that whenever any judgment of the Circuit Court, or any decree of the Court of Chancery, may be rendered, subjecting to sale the separate estate of a married woman, she shall be entitled to an appeal, without giving security for the costs, on making affidavit that she is unable to give such security.

The general rule requires security for costs. The exceptional privilege in favor of married women, because of disability of coverture, is restricted, by the terms of the statute, to judgments and decrees which order or condemn to sale property as *her separate estate*. The judgment, from which the appeal is taken, did not condemn the property to sale as the separate estate of appellant; but, on the contrary, the jury, by their verdict, found that it was not her separate estate, and the court condemned it to the satisfaction of plaintiff's judgment, as the property of the defendant in execution. In such cases, the general rule applies, and security for costs must be given. *Cahalan v. Monroe*, 65 Ala. 254.

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The motion to dismiss must be granted, unless, within thirty days, the appellant gives security for the costs of the appeal, which may be taken and approved by the clerk of the Circuit Court and certified to this court.

Knox et al. v. Nall et al.

Bill in Equity to Redeem Mortgaged Property.

1. *Credit on usurious debt by mortgagee.*—When the mortgagee receives mortgaged property from the mortgagor, to be credited at an agreed price on the mortgage debt, a subsequent abatement of the mortgage debt, on bill filed to redeem, on account of usury, will not entitle the mortgagee to a corresponding reduction of the credit allowed.

APPEAL from Pike Chancery Court.

Heard before the Hon. JNO. A. FOSTER.

This was a bill filed by Jas. P. Nall and others to redeem certain mortgaged property, claiming that there was usury in the debt secured by the mortgage, and that the debt, purged of usury, had been paid. The bill avers that on March the first, 1881, complainants executed and delivered their promissory note for eleven thousand dollars to respondents, C. J. Knox and others, who are appellants here, and executed a mortgage on certain real estate in the town of Troy to secure the same; but that their real indebtedness, exclusive of usurious interest, was only about seven thousand dollars. It further shows that complainants conveyed the old Central warehouse to the mortgagees, as a payment on said debt, for which they were to be credited with five thousand five hundred dollars on the 27th of August, 1881; and that on the 28th of July, 1882, by sale to mortgagees of the new Central warehouse, it was agreed that complainants' debt should be credited with the further sum of six thousand eight hundred and ninety-five and 65-100 dollars. The bill sets out the various transactions constituting the consideration of their said note for eleven thousand dollars, and alleges that interest thereon had been charged by respondents at 18 *per cent. per annum*.

Respondents, in their answer, do not deny the usurious interest charged, but aver that complainants had executed a deed to C. J. Knox to said new Central warehouse on a recited consideration of six thousand dollars; but the record fails to show that the deed was offered in evidence. Respondents further claimed that the credit of \$6,895.95 alleged to have been

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agreed upon, on account of the new Central warehouse, was a part of the whole mortgage debt due from complainants, and that if the whole was tainted with usury, this part of it should be sealed for usury, and complainants be allowed only such credit as should remain after disallowance of the usury in said sum. The cause was submitted for reference to the register, to ascertain and state the account between the parties. The register, in his report, allowed a credit upon complainants' debt of six thousand eight hundred and ninety-five and 95-100 dollars on account of the new Central warehouse, and found the balance due respondents, seven hundred and sixty-five and 78-100 dollars. To this report respondents filed their exceptions, which were overruled by the chancellor, and respondents appealed.

GARDNER & WILEY, for appellants.

N. W. GRIFFIN, and W. D. WOOD, *contra*.

STONE, C. J.—The present bill was filed by appellees to redeem mortgaged real estate, and sets up usury in the debt secured, in part reduction of the amount claimed by the mortgagee. What is known as the new Central warehouse was one of the pieces of property specified and conveyed in the mortgage. By private agreement, that piece of property was sold and conveyed by the mortgagors to one of the mortgagees, Knox, in consideration of a credit of six thousand eight hundred and ninety-five and 95-100 dollars, to be entered on the mortgage debt. Taking the debt at its face value, and allowing this credit upon it, there would remain due and unpaid of the mortgage liability twenty-three hundred and fifty dollars. The answer admits the usury as charged, and hence there is no controversy as to the amount of unlawful interest embraced in the note and mortgage. The real and only contention in this case is, that inasmuch as this portion of the debt was paid in property, upon an agreement to enter, in consideration thereof, the stipulated credit on the debt, it must be treated, not as a sale of the warehouse at an agreed price, but as an exchange of one for the other in the condition in which they then stood; and that if the debt is reduced by the elimination of the usurious interest, this will lead only to a corresponding reduction in the estimated value, or purchase-price of the warehouse. The register, in stating the account, ruled against defendants on the question above presented, and they filed exceptions to his report, as follows:

“First.—They except to so much of the register's report as allows complainants a credit of six thousand eight hundred and

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ninety-five and 95-100 dollars, proceeds of the new Central warehouse:

"Second.—Except to so much of the register's report as shows a balance due on respondents' note and mortgage of [only?] seven hundred and sixty-five and 78-100 dollars." The chancellor overruled the exceptions, and confirmed the report.

In the note, referring to the testimony relied on in support of the said exceptions, is the following language: "Respondents rely on * * so much of the deed executed by complainants to C. J. Knox, which recites the consideration of six thousand dollars as the amount paid for the new Central warehouse." That deed is not in the record, and it is nowhere shown that it was offered in evidence. There is no note of the testimony that was submitted to the chancellor, when he made the decree of reference. We are thus left, so far as this question is concerned, to the testimony of C. J. Knox and J. P. Nall, for no other witness sheds any light on it.

There is no averment in the pleadings, nor is there any testimony, tending to show the money value of the new Central warehouse, other than the agreed sum for which credit was allowed for it. We have no *data* for affirming its value was less than that. And scrutinizing the testimony *pro* and *con*, we do not find it satisfactorily proved, that there was any agreement, express or implied, that the transaction was other than it appears on its face to have been—a purchase of the warehouse at the agreed price and value of six thousand eight hundred and ninety-five and 95-100 dollars. It results that we are not clearly convinced the chancellor erred, and his decree must be affirmed.

Bergan v. Jeffries.

Bill in Equity to Enjoin Action at Law.

1. *Mortgage of wife's statutory estate a nullity.*—A mortgage by a married woman of her statutory separate estate, to secure the debt of her husband, is a nullity.

2. *Same ; a bill to enjoin suit on, without equity.*—A bill to enjoin a suit on such mortgage is without equity, there being a good and perfect defense to the action at law.

3. *Same ; fraud does not give jurisdiction.*—The fact that a fraud may have been perpetrated on the wife, would not give jurisdiction, without some other ground of equitable cognizance, where there is a plain and adequate remedy at law.

4. *Same ; when mortgaged property is real estate.*—If the property mort-

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gaged were real estate, instead of mere personalty, under the decisions of this court, the bill would not be without equity.

4. *Jurisdiction*.—No jurisdiction can be derived from section 3757 of the present Code.

APPEAL from the Chancery Court of Russell.

Heard before the Hon. JNO. A. FOSTER.

The bill in this case was filed by Mrs. Sarah J. Jeffries to enjoin an action of detinue, commenced in the Circuit Court of Russell county by the appellant, M. T. Bergan, who sought to recover certain personal property, named in a mortgage executed to him, signed with the names of appellee and her husband. The bill avers that the name of appellee was fraudulently signed to the mortgage; that the property therein named was her statutory separate estate; and that the debt secured was the debt of her husband. The bill prays for the cancellation of the mortgage, and that said Bergan be perpetually enjoined from proceeding against the property named therein, and for the surrender and cancellation of the note secured by the mortgage. Defendant demurred to this bill, on the ground, "that the case made by the bill sought no relief that plaintiff could not obtain upon trial at law of the pending action." The chancellor overruled the demurrer, and granted leave to complainant to amend her bill, showing how she came possessed of the property, claimed as her statutory separate estate.

The bill was submitted on pleadings and testimony, and the chancellor rendered a decree declaring the mortgage null and void, ordered a restoration to plaintiff of the property seized by appellee under the mortgage, with damages for its detention.

From this decree defendant appeals, and assigns the same, together with the decree overruling defendant's demurrer to the original bill, as error.

WATTS & SON, for appellant.

A. A. DOZIER and W. J. SAMFORD, for appellee.

SOMERVILLE, J.—The bill is filed to enjoin an action in a court of law, which was brought to recover certain specific personal property. The title of the plaintiff in that action, Bergan, was dependent on a mortgage purporting to have been executed by the appellee, Mrs. Jeffries. The bill states facts which, if true, show the mortgage to be absolutely void. It avers that the property purporting to have been mortgaged was the statutory separate estate of Mrs. Jeffries, and that her name was signed to it by her husband, then living, without her knowledge or consent, and that the debt was that of her hus-

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band. Our decisions are uniform in holding such a conveyance to be a mere nullity, even where executed with the full consent of the wife. This was a good and perfect defense to the action at law, and the bill was, therefore, without equity.

This being the case, the fact that a fraud may have been perpetrated on the wife by the unauthorized use of her signature, would not give jurisdiction, because fraud alone, without some other ground of cognizance, does not authorize a party to seek redress in a Court of Chancery where he has a plain and adequate remedy at law.—*Smith v. Cockrell*, 66 Ala. 64; *Dickinson v. Lewis*, 34 Ala. 643; *Knotts v. Tarver*, 8 Ala. 743.

If the property mortgaged were real estate, instead of mere personalty, it may be that, under our decisions, the bill would not be without equity. But the reason of these cases has no application to void conveyances of personal property—*Ryall v. Prince*, 71 Ala. 66; *Boyleston v. Farrior*, 64 Ala. 564; *Peebles v. Burns*, 77 Ala. 290.

It is obvious that no jurisdiction can be derived from section 3757 of the present Code. That section on its face applies only to cases of ordinary equitable cognizance. Its language is that "Courts of Chancery shall take cognizance of cases *in equity*," in the particular instances mentioned.

The decree of the chancellor, granting relief to the complainant is erroneous and must be reversed, and a decree will be rendered in this court dismissing the bill.

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Trover.

1. *Proof of declarations of intestate in action against administrator.* The statutory exclusion of testimony as to transactions with, or statements by, a deceased person, whose estate is interested in the result of the suit (Code, § 3058) extends to both the adversary parties; and where the effect of the testimony of an administrator as to declarations made by his intestate, explanatory of his possession of certain property, would be to increase the assets of the estate, such testimony is not admissible against the opposing party.

2. *Estoppel; nature of, and when enforced.*—The doctrine of estoppel has its origin in good morals, and in considerations of good faith, and its underlying principle is, that declarations or admissions, express or implied, made for the purpose of influencing the conduct of another, if the designed effect ensues, are conclusive upon the party making them; but an estoppel, being in its nature defensive, will not be used to effectuate a gain, and will not be enforced further than is requisite to protection from injury.

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3. *Same ; estoppel en pais ; what does not operate as.*—Where an administrator demanded certain personal property as assets of his decedent's estate, and it was surrendered to him by the parties in possession without objection, or the assertion of any adverse title in themselves, and it was appraised and included in the inventory of the administrator and subsequently sold under an order of the Probate Court ; but prior to the sale the parties notified the personal representative of their claim to the property and warned him not to sell the same: *Held*, in an action of trover against the administrator, that while the delivery of the property, without asserting title, was a strong admission, it did not constitute an estoppel when the defendant was notified of the claim before a sale, and in time to prevent injury. *Held*, further, that while the administrator incurred a *prima facie* liability by having the property appraised and returned in his inventory, such *prima facie* liability is not available to him as a defense in the present suit as he was not concluded by the appraisement or inventory, but could have so amended it as to omit the property on discovering that it did not belong to the estate.

APPEAL from Perry Circuit Court.

Tried before Hon. JNO. P. HUBBARD.

This was an action of trover brought by Martha J. Hudson and Loumalia Pin, against Emanuel Adler to recover damages for the conversion of a mule and cow ; and was commenced on Feb. 15, 1885. Issue was joined on the plea of not guilty ; the trial resulting in a verdict and judgment for the plaintiffs. As shown by the evidence, plaintiffs deduced title to the property, the subject of the alleged conversion, by gift from their grandmother, Jennie Adams, who had acquired it by parol gift from her husband, June Adams. The plaintiffs and their grandmother and the said Adams had long lived together on the same premises, and continued to do so until the death of Adams and his wife, which occurred in 1884. On the 23d October of that year, letters of administration on the estate of the said June Adams were granted to the defendant, Emanuel Adler ; and shortly thereafter, in his capacity as administrator, he demanded of the plaintiffs the property in question, claiming it as assets of his decedent's estate and subject to administration. In accordance with this demand, the mule and cow, the subject of the suit, were surrendered to the defendant, and appraised and included in his inventory ; and subsequently sold in pursuance of an order of sale granted by the Probate Court. The evidence shows that at the time of defendant's demand for the property, the plaintiffs interposed no protest or objection, and asserted no adverse title in themselves ; but prior to the sale they notified the defendant of their claim and warned him not to proceed with the sale.

As further shown by the bill of exceptions, the defendant, testifying in his own behalf, offered to prove that Adams, when about to obtain advances from the witness in the early part of the year 1884, "told him, defendant, that he had two mules on

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said premises which were his, Adams' property," the plaintiff objected, the court sustained the objection, and the defendant duly excepted. Among other instructions, the court charged the jury, "that if the defendant demanded of the plaintiffs the property which belonged to the estate of Adams, and they delivered to him, as administrator, the mule and cow, as a part of said estate; and he thereupon had the same appraised and included in his inventory, without objection on their part, and without any notice or information that they claimed any right or title to said property, or any part thereof, that yet, if the property really belonged to them, at the time, and if they afterwards, and before the sale thereof by the administrator, notified him that they claimed the same, and forbade the sale thereof, that they would not thereby be estopped from setting up their title, and recovering damages, if otherwise entitled to recover for the conversion thereof in this suit." To this charge the defendant excepted; and here assigns the same (with other grounds of error not insisted on in argument), and the refusal of the court to admit the declarations of appellant's intestate, explanatory of his alleged possession of the property, as error.

BROOKS & ROY, for appellant.

J. W. BUSH, *contra*.

CLOPTON, J.—While it is admissible to prove the declarations of a party in possession of property, as explanatory of his possession, they must be proved by a witness competent to testify. As an exception to the competency of parties as witnesses, the statute provides: "Neither party shall be allowed to testify against the other, as to any transaction with, or statement by, any deceased person whose estate is interested in the result of such suit." The effect of the testimony of the defendant, which was excluded by the court, would have been, if believed, to increase the amount of the assets of the estate. In such case, the personal representative is incompetent to testify, as against the other party, to transactions with, or statements by his intestate. The exclusion extends to both the adversary parties.—Code, § 3058; *Dunlap v. Mobley*, 71 Ala. 102.

The only other assignment of error, insisted upon in argument, is the charge of the court, relating to the question of estoppel. On the hypothesis of the instruction as given, the question arises, whether the plaintiffs are estopped from proving their title and ownership in this suit, because when the defendant, as administrator, demanded of them the property which belonged to the estate of his intestate, they delivered to him the property in question as a part of the estate, and he

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thereupon had it appraised and included in his inventory without objection from the plaintiffs, and without notice, that they claimed the property, but was notified of their claim before a sale?

The doctrine of estoppel is founded upon the primary and ultimate aims of the law—the redress of wrong, the prevention of fraud, and the promotion of the ends of justice. Having its origin in good morals and in considerations of good faith, its operation and effect are useful and beneficent, when its application is confined to cases, where it is manifest, that the acts or statements, on which another has relied and acted, can not be retracted, “without a breach of faith on the one hand, and injury on the other.” The underlying principle is, that declarations, or admissions, express or implied, made for the purpose of influencing the conduct of another, if the designed effect ensues, are conclusive upon the party making them. What one person has induced another to believe and act on to his detriment, will, as between them, be regarded as true. But an estoppel, being in its nature defensive, will not be used to effectuate a gain; and will not be enforced, further than is requisite to protection from injury. —2 Smith’s Lead. Cases, 858 to 865.

An essential element of an estoppel is injury, as the legal result of the wrongful acts, or admissions, or of culpable silence. The rule of estoppel only precludes from alleging and proving the truth, when to gainsay the assertions or admissions, on which the other party has relied, and which have induced a particular course of action, will result in injury. To raise an admission from the rank of evidence to that of an estoppel, it must not only be inconsistent with the evidence proposed to be given in a subsequent controversy, but must also have so influenced the conduct of the other party, that loss or injury will result from allowing the evidence to be introduced.—*Miller v. Hampton*, 37 Ala. 342; *Patterson v. Lytle*, 11 Penn. St. 53. It is claimed that injury has resulted from the conduct of the plaintiffs, because the defendant, acting on their conduct and silence, had the property appraised and included in his inventory, thereby incurring a liability to account for its value to those interested in the estate. *McCravey v. Remson*, 19 Ala. 430, is cited and relied on. It is true, that in the opinion the estoppel is based on the facts, that the executor acted on the admissions of the legatee, who delivered the slave to him on his demand, had her appraised and inventoried, and rendered himself liable to account for her value to those interested in the estate, from which liability he had not been discharged. The material fact, that the legatee, who delivered the slave, subsequently hired her from the executor, is not mentioned or referred to. Having obtained possession by a contract of hir-

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ing, and by recognition of the right of the executor, he would not have been permitted, without having first surrendered possession, to set up an adverse title; and the estoppel applied to the vendee, to whom he sold the slave, while thus holding possession. On the facts of the case, the conclusion of the court was correct, though based on insufficient reasons. The only authorities cited to support the opinion are cases of bailment.

The injury, requisite to make the estoppel effective, must be the legal and proximate result of the acts and silence of the plaintiffs—injury, which can not be avoided, if they are allowed to gainsay the admissions, implied from their delivery of the property as a part of the estate, without claim or objection. If the injury consists in a liability incurred, it must be a fixed liability, from which the defendant can not be discharged, if the plaintiffs are allowed to prove their title. To constitute a requisite element of estoppel, the loss or injury must be the result of the co-operative influence of the wrongful conduct or admission, and of the unsuccessful assertion, and proof of the true title, and real ownership. If the defendant can be restored to his original condition without detriment, an estoppel does not arise.—*East v. Dolihite*, 72 N. C. 562. By having the property appraised and returned in the inventory, the defendant incurred a *prima facie* liability. He is not concluded by the appraisement or inventory; but may amend it so as to omit the property if it does not belong to the estate.—*Mc Williams v. Ramsey*, 33 Ala. 813. A judgment against him for the recovery of the property in favor of the plaintiffs, as the real owners, will, in the absence of fraud or collusion in its rendition, protect him against any liability, with which those interested in the estate may seek to charge him. The assertion and proof of their title and ownership, and in consequence a recovery of the property, operates to maintain rights thus judicially ascertained to be valid, and at the same time to defeat or avoid the *prima facie* liability of the defendant and any injury that might otherwise result. And the estate is not prejudiced by the loss of property, which did not belong to the decedent. However false the admissions, or wrongful the conduct, an estoppel will not be enforced, unless necessary to prevent an innocent person from loss, by having been misled, or a guilty party from gaining an undue advantage. An estoppel is unfounded, when the successful assertion and proof of the truth itself arms the other party with security and protection against loss or injury. To enforce an estoppel, in such case, would constitute it an instrument of gain; and carry it further than justified by the necessity to prevent injury. The acts and silence of the plaintiffs created an estoppel from maintaining an action against the defendant for having taken possession of the property; and if he

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had sold it before notice of their claim, they would have been estopped from alleging and proving their title. But, while the delivery of the property without asserting title is a strong admission, it does not rise to the dignity of an estoppel, when they notified the defendant of their claim before a sale, and in time to prevent injury.

Affirmed.

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Indictment for Larceny.

1. *Attempted fraud in procuring testimony; when properly considered to disadvantage of party attempting same.*—If a party attempts to practice a fraud on the court, by procuring, or assisting to procure, testimony which he knows to be false, this is a circumstance which the jury may properly consider to his disadvantage; but, to justify a charge invoking this principle, there must be evidence tending to show such procurement of false testimony, and mere conflict of testimony as to some of the facts of the case is insufficient (*Beck v. State*, ante, p. 1).

2. *Abstract charge; when reversal worked by.*—An abstract charge, even though it assert a correct legal proposition, will work a reversal if it probably misled the jury.

APPEAL from Bibb Circuit Court.

Tried before Hon. J. E. COBB.

The appellant, Buck Vance, and Bill Wyatt were jointly indicted at the Spring term, 1885, of said court for the offence of grand larceny—the subject of the alleged larceny being two hogs the property of one George Randolph. The said Wyatt escaped from custody shortly after his arrest, and the appellant was convicted of the offence charged, under a plea of not guilty, at the ensuing Fall term of said court. The facts necessary to an understanding of the point adjudicated by the court are sufficiently indicated in the opinion.

Name of appellant's counsel not disclosed by the record.

T. N. McCLELLAN, Attorney-General, for the State.

CLOPTON, J.—The only error, apparrent from the record, consists in the general charge, where the court instructed the jury: "If the defendant had knowingly and wilfully procured facts material to his defence to be sworn to, which he knew were false, this might be considered as a circumstance against

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the defendant in weighing the evidence, and may be a presumption against him; but this is a matter for the jury, to be considered or not as they determine in view of the whole evidence." In *Beck v. State*, ante, p. 1, a charge, the same in substance, was given. The only incidents of the trial, which raised the legal proposition of the charge, were conflicts in the testimony on questions of fact. It was held, that the charge was abstract, and that an abstract charge, though asserting a correct legal principle, if it probably misled the jury, will work a reversal. And further; that it authorized the jury to draw an inference, when there was no testimony from which it could be drawn. The record in the present case purports to set out all the evidence. The only circumstances shown, on which to base the legal proposition of the instruction, are a conflict as to an interview between Wyatt and the defendant near the office of the justice, and a discrepancy between two of defendant's witnesses, as to the time he killed his hog. The charge asserts a correct principle, applicable when there is any evidence tending to show there has been the procurement of false testimony, but mere conflicts of testimony as to some of the facts of the case are insufficient. On the authority of *Beck v. State*, supra, the judgment must be reversed.

Reversed and remanded.

Barclay, Assignee, et al. v. Spragins, Administrator.

Appeal from Interlocutory Decree Sustaining Demurrer to Cross-Bill.

1. *Appeal from interlocutory decree sustaining demurrer to cross-bill; when does not lie.*—An appeal does not lie from an interlocutory decree sustaining a demurrer to a *cross-bill*, without an order dismissing it; and such appeal will be dismissed by the court *ex mero motu*, notwithstanding a joinder in error. (Overruling *Brooks v. Woods*, 40 Ala. 538).

APPEAL from Madison Chancery Court.

Heard before the Hon. S. K. McSPADDEN.

The bill in this cause was filed by appellee as the administrator *de bonis non* and *cum testaments annexo* of Samuel W. Coon, deceased, seeking to enforce a charge of three thousand dollars upon lands devised by his testate, Samuel W. Coon, to Mildred A. Barclay for life, subject at her death to said charge

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of three thousand dollars to be paid to the personal representative of said Coon, for the benefit of his estate. The bill alleges the death of said Mildred A. Barclay, and the demand by complainant of the heirs-at-law and distributees of said testate for the payment of said sum, but that said heirs-at-law are in possession of said land, refuse to pay said sum, or to surrender the possession of said land to complainant, and that they own no property or estate subject to complainant's claims, except the said devised lands.

The bill prays for a decree establishing a lien upon said land for \$3,000.00, with interest, and that the same might be sold for the payment of said sum. Defendants answered the bill, and one Alfred F. Barclay filed his petition asking to come in as a party defendant, and propounds a claim to one-third interest in the lands in controversy, as the assignee in bankruptcy of Anderson M. Barclay, who, it is alleged owned said interest unaffected by the charge sought to be fixed upon the whole of said lands by the will of complainant's testate. Said Barclay, answering, prays that his answer may be taken as a cross-bill against complainant. To this answer and cross-bill appellee demurred, assigning a number of grounds of demurrer, and also moved to dismiss said cross-bill for want of equity. The chancellor sustained the demurrer, and from this action or ruling this appeal is taken.

R. W. WALKER, for appellant.

D. D. SHELBY and R. E. SPRAGINS, *contra*.

SOMERVILLE, J.—The appeal in this cause is taken from an interlocutory decree of the chancellor sustaining a demurrer to a cross-bill, without any order of dismissal or other disposition of it.

Such a decree is manifestly interlocutory and not final, and no appeal from it will lie to this court, unless it can be sustained as coming within the influence of section 3918 of the present Code. In *Parish's Adm'r v. Galloway*, 34 Ala. 163, it was held that an appeal would not lie from a decree dismissing a cross-bill and continuing the original cause, because such a decree is not final. The case of *Brooks v. Woods*, 40 Ala. 538, where such an appeal was sustained, on the ground that the appellee had joined in the assignment of error, was decided without proper consideration, and can not be sustained. The question is jurisdictional, and consent can not confer jurisdiction on the subject-matter, in matters appellate, any more than in those original.

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There are but three classes of interlocutory decrees from which appeals are now authorized to be taken under section 3918 of the Code of 1876: (1.) Decrees sustaining or overruling a demurrer to a bill in equity. (2.) Decrees sustaining or overruling a plea to such bill. (3.) Decrees sustaining or overruling a *motion to dismiss* such bill for want of equity. Code, §§ 3918, 3916.

A cross-bill, in our opinion, is not "a bill in equity" within the meaning of the statute. The reference is very clearly to original bills. The purpose of the statute is to facilitate the speedy decision of chancery causes, and to diminish the costs of litigation, a large portion of which accrues from the taking of testimony.—*Winn v. Dillard*, 60 Ala. 369; *Hightower v. Kennedy*, 11 Ala. 362. It is not intended unnecessarily to multiply appeals, nor would the most liberal view of it authorize a construction which would split up a chancery cause and adjudicate its equities by piece-meal. Hence the nature of the interlocutory decrees from which appeals are authorized. They go to the merits of the whole cause, and not a mere fractional part of it. If the bill states the true case, as must be presumed on demurrer or motion to dismiss for want of equity, an interlocutory ruling may result in ending the litigation, in the absence of any amendment made or proposed by the party losing. So with a ruling on the sufficiency of a plea, which is tested by demurrer.

These reasons have no application to a cross-bill, which often is only a mode of defense to the original bill, and the fate of which is not necessarily decisive of the main suit. "It may fail for want of necessary averments, or defect of proof, and still the complainant in the original bill may obtain no relief for want of equity in his bill, or for a like defect of proof." *Parish v. Galloway*, 34 Ala. 163, *supra*.

We are of opinion that an appeal from a decree sustaining a demurrer to a cross-bill is not authorized by section 3918 of the Code. The case of *Winn v. Dillard*, 57 Ala. 167, holding a contrary view, is hereby overruled. We have no jurisdiction of the appeal, and must *ex mero motu* dismiss it.

Linn v. McLean.*Bill in Equity to Enforce Vendor's Lien on Land.*

1. *Statute of frauds as to contracts for sale of land; acceptance by attorney.*—In a bill to enforce a vendor's lien, alleging that the defendant's election to purchase, under the option reserved to him by the contract, was manifested by a letter written by his attorney, it is not necessary to allege that the attorney had written authority to accept; and the averment that he was "duly authorized" not being denied, no question arises under the statute of frauds.

3. *Option to purchase; when contract of sale is complete.*—When one party offers to sell, and allows the other twelve months within which to elect whether he will purchase; if the latter elects to purchase within the given time, and gives notice of his election, the contract then becomes mutually obligatory, and a court of equity will decree specific performance in favor of either against the other; but, if the acceptance is conditional, or introduces an alteration or modification of the original proposal, the contract is not complete until the other party has signified his assent to the change.

3. *Negotiations through the mails.*—When the parties reside in different places, and conduct their negotiations through the mails, an offer or acceptance can not be retracted after it has been posted; and where the vendor and the attorney of the non-resident purchaser, through whom the negotiations were conducted, were in the same city negotiating in person, a letter posted by the attorney on the last day allowed for an election, declaring his acceptance, binds his client from the time it is posted, although it may not bind the other party until received.

4. *Revocation of acceptance.*—A subsequent interview between the parties, on the day the letter was posted, can not be considered a revocation of the acceptance therein expressed, when the subject of the interview was a pending adverse suit for the land, and no allusion was made to the letter by either party.

5. *Execution of conveyance, and payment of purchase-money.*—A purchaser is not bound to accept a conveyance, the covenants of which are broken *eo instanti* on its execution; nor will he be compelled to accept a deed from his vendor, when an adverse claim to the land has been asserted, and the suit is still pending and undetermined.

6. *Bill to enforce vendor's lien, when conveyance has not been executed.* In a bill to enforce a vendor's lien, when no conveyance has been executed to the purchaser, and the payment of the purchase-money is to be contemporaneous with the execution of a conveyance, the complainant must allege that he is ready, willing and able to execute a good and sufficient deed; and if it appears that an adversary suit for the land is then pending and undetermined, the bill is prematurely filed.

7. *Bill in nature of specific performance; inquiry as to title.*—Though the vendor's bill, in such case, can not be maintained strictly and solely for the purpose of enforcing his lien on the land, it may be maintained as in the nature of a bill for specific performance, under which it is sufficient that he is able to make a good title at any time before final decree; and in granting specific performance, and compelling the purchaser to accept a conveyance, the court may hold the land bound for

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the purchase-money, and order a sale on default of payment within a reasonable time; yet, the sufficiency of the title being denied, and not being conclusively established by a single judgment against the adverse claimant (Code, § 2969), an inquiry into the title should be first ordered and made, and the court should be satisfied as to its sufficiency.

APPEAL from the Chancery Court of Elmore.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed on the 20th March, 1885, by William S. McLean, against J. J. Linn, and sought to enforce an alleged vendor's lien on land for the unpaid purchase-money. The tract of land contained about sixty acres, and was described as "the north half of the south-west quarter of section 31, township 18, range 17, except twenty acres taken off the east side of said land in a strip, whose western boundary shall be parallel with the said eastern line."

On the 13th February, 1884, the complainant sold to said Linn, and conveyed by deed, in which his wife joined, "all the ochre in, on or under the said tract of land, which said J. J. Linn shall mine or take out of the land, between now and the 1st day of January, 1887," together with the right to enter on and use the land, so far as might be necessary for the purpose of mining for the ochre, storing and removing it, and to erect suitable buildings. The consideration recited was the payment of \$1,000 cash in hand, and the payment of a royalty of seventy-five cents per ton for all the ochre dug and removed; and the deed contained a stipulation in these words: "In consideration of the premises, we and each of us agree and bargain with said J. J. Linn, that he may, at any time within twelve months from the date hereof, purchase said sixty acres of land, ochre and other minerals, for the sum of \$7,000, in addition to the said sum of \$1,000 paid by said Linn on the delivery of these presents; and on such payment being made, we bind ourselves, our heirs, executors and administrators, to make and deliver to said J. J. Linn a warranty deed in fee simple to the said lands." The deed contained, also, full covenants of warranty.

Linn entered on the land under this contract, and dug and removed ochre, and, as the bill alleged, "before the time limited by said contract [had expired], availed himself of the provision authorizing a purchase of said land at the price named, and notified complainant that he elected to purchase said land, as provided in said contract; which notification was in writing, and in words and figures as follows." The writing here set out in the bill is a letter signed by Chas. P. Jones, "as attorney for J. J. Linn," dated at Montgomery, Feb. 13th, 1885, addressed to the complainant, and in these words: "I desire to inform you that, under the contract between yourself

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and Dr. J. J. Linn, on the 13th day of February, 1884, he takes the option of purchase, and is ready to comply whenever you give him a good title to the land, as your contract binds you to do. Your contract binds you to deliver to Dr. Linn a warranty deed in fee simple, and he looks to you for a performance of your contract, and expects compliance on your part." The bill alleged that, at the time this letter was written, "said Chas. P. Jones was the duly authorized attorney of said Linn to notify complainant of such election;" that complainant "accepted said election of purchase, and called on said Linn, soon after the receipt of said letter, and offered to execute the deed required, and demanded payment of said \$7,000; that said Linn refused to pay the same, and informed complainant that he would not pay the same, even if your orator delivered to him the deed required in said notice; that afterwards, on the 25th February, 1885, notwithstanding said refusal by said Linn, complainant and his said wife executed a deed with full covenants of warranty, conveying said land in fee simple to said Linn, and tendered the same to him, through his said attorney, Chas. P. Jones, and demanded payment of said purchase price, \$7,000; but said Jones, for said Linn, refused to pay said money, and said Linn still holds said lands," &c. On these averments, the bill prayed that a lien for the payment of said \$7,000, with interest, be declared in favor of the complainant, and that the land be sold for the payment of the same.

The defendant filed an answer, in which was incorporated a demurrer, specifying as grounds of demurrer—1st, that "the bill shows defendant went into possession of the land under a lease, and not as a purchaser;" 2d, that the bill does not set forth a contract of purchase; 3d, that the letter of Jones "is not sufficient to bind either party as to the purchase or sale of said land, under the written contract set out;" 4th, that said letter "was not sufficient to bind complainant to convey said lands, nor to divest him of either the legal or equitable title thereto;" 5th, because said letter, "construed most strongly against this respondent, was a mere agreement to purchase, and not a purchase;" 6th, "because the bill makes no case for the enforcement of a vendor's lien, or for the specific performance of any contract enforceable in equity."

The material averments of the answer are contained in the following extracts: "Respondent admits that the third paragraph of the bill contains a correct copy of a letter from Chas. P. Jones, as attorney for this respondent, to said McLean, dated Feb. 13th, 1885. Respondent avers that said letter was written and deposited by said Jones in the post-office, at Montgomery, about 9 o'clock in the morning of Feb. 13th, 1885; that after the mailing of said letter, and before the said Mc-

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Lean knew either of its existence or its contents, said Jones and C. O. Nash, the agent of this respondent, who had in his possession, as such agent, checks for the money to comply with said contract, met said McLean at the office of J. M. Falkner, in the city of Montgomery, and had a conversation with him in regard to the purchase of said land; that said McLean was then and there informed that said Nash had the money, and was ready to purchase for this respondent, if said McLean would make him a good and sufficient title to said land, which should be satisfactory to his attorney, but that respondent would not purchase while the suit of Ellen M. Smith, which had been filed against said Nash and this respondent to recover forty acres of said land, was pending and undetermined; and respondent avers that said McLean was then asked to extend the option until the termination of the said suit, which he refused to do, and demanded that the money must be then paid, if respondent wanted to purchase, or the said contract would stand as it was without variation; and for this reason respondent would not pay said money, nor buy said lands. Respondent denies that said McLean ever acknowledged the receipt of said letter, and denies that said McLean, before or after he received said letter, ever called on him, or offered to execute any deed; and he denies that said McLean ever demanded of him said \$7,000, or had any conversation with him on the subject. Respondent avers that, on said 13th February, said McLean met C. O. Nash and said Chas. P. Jones, in the office of J. M. Falkner, in the city of Montgomery, and came to said Jones, with whom he had held a conversation on the day previous, and said he was ready to execute a deed, if the money was then paid; that he was then again informed that suit had been brought against respondent for a portion of the land, and that respondent, not being satisfied with the title offered, would not purchase unless McLean would give him some security to save him harmless against the pending suit. Said McLean then stated to said Jones, that the option in said contract expired that day, and that he would not execute any deed unless the money was paid that day; and he was then informed by said Jones, who at that time represented this respondent, that he could not advise respondent to purchase said lands in the state of the title at that time. Said McLean was informed in this, as in the former conversation, that unless he would extend the time in which respondent might purchase, he could not run the risk of the law suit, and would not buy the property. And respondent avers, that he never has, nor has any one for him, in any way signified his election of his right to purchase, and based his refusal to pay solely on the ground of the pending suit; but that he declined to purchase because he did not wish

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to run the risk of a law-suit, and therefore did not pay the money because he declined to purchase. Said McLean well knew on said 13th February, 1885, that respondent never intended any purchase, and meant to remain in possession of said land, and has remained in possession since that time, claiming the right to do so under said lease, and has never set up any title in himself save as lessee."

The chancellor overruled the demurrer to the bill, and, on final hearing on pleadings and proof, rendered a decree for the complainant; and his decree is now assigned as error.

WATTS & SON, J. M. FALKNER, and C. P. JONES, for appellant.

GUNTER & BLAKEY, *contra*. (No briefs on file.)

CLOPTON, J.—The stipulation of the contract of February 13, 1884, giving appellant the right to purchase at any time within twelve months, may be regarded as an offer to sell, continuing and extending through the stipulated time; and, being supported by a sufficient consideration, it is not subject to revocation. If not accepted within the time limited, the proposal is withdrawn by its own limitation; but, though the agreement is unilateral, if accepted within the twelve months, it becomes mutually obligatory, and such as a court of equity will, in a proper case, enforce specific performance against either party, in favor of the other.—*Willard v. Tayloe*, 8 Wal. 557.

The bill is brought by appellee, to enforce a vendor's lien for the payment of the purchase-money. Whether or not there was a binding acceptance, is the main matter of contestation between the parties. The complainant claims, that the acceptance was made February 13, 1885, by a letter of that date written by the attorney of the defendant, a copy of which is set out in the bill. The letter substantially informs complainant that defendant takes the option to purchase, and is ready to comply whenever a good title to the land is made. The exercise of the option to purchase is express; compliance being conditioned on a good title being given.

It is urged in argument, that as the authority of the attorney is not shown to have been in writing, the defendant is not bound by the election. The bill alleges that the attorney was "duly authorized;" and as an averment that he was authorized *in writing* is not requisite, the question can not be raised by demurrer. The answer admits the writing and mailing of the letter, and the correctness of the copy contained in the bill; and states that the attorney represented the defendant in the negotiations then pending for an extension of time, in which

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to exercise the option to purchase. The facts requisite to the defense of the statute of frauds are not alleged. The authority of the attorney is not put in issue; and the question is not properly presented for our decision.

It is further insisted that the election was revoked before the letter was received by complainant. The letter was posted at Montgomery, in the morning of the day on which it was written. Generally, posting a letter is not a delivery to the person to whom it is addressed. Actual receipt is necessary. The rule, that when the parties reside at different places, and, from considerations of convenience or necessity, negotiate by correspondence through the mails, neither the one making an offer, nor the party accepting, can retract after the acceptance is posted, does not apply. "The rule is restricted to cases where, by reason of general usage, or of the relation between the parties to any particular transaction, or of the terms in which the offer is made, the acceptance of such offer through the post is expressly or impliedly authorized."—1 Benj. on Sales, § 45; 1 Whar. Con. § 19. Though the defendant resided in Minnesota, it appears from the evidence that, from the date of the letter, until the 20th of March, with the exception of four or five days, he was in Montgomery or its vicinity, where both the attorney and complainant resided. Negotiations in person between the attorney and the complainant were had on the day preceding, and on the same day, subsequently to the mailing of the letter. There is neither express nor implied authority to accept through the mail. The defendant, however, having adopted such mode to exercise his option, and to notify complainant, must be held bound thereby, though it may not bind complainant unless and until the letter was actually received. But when received, the acceptance is complete on the part of defendant, unless it contains a modification or alteration of the terms of the offer, or something has intervened to defeat its operation.

There can be no question of the right of defendant to retract an uncommunicated acceptance; and it is contended that retraction was the necessary result of a subsequent interview on the same day. There were two personal interviews on the preceding day, when complainant was informed of the institution of the suit by Smith to recover possession of forty acres of the land, and that defendant was unwilling to run the risk of the suit. An extension of time in which to exercise the option was therefore requested. No definite answer to the request was then given; but, at the close of the second interview, complainant said, that he would inform them of his conclusion during the next day. On the next morning, without waiting for the information, the letter was written and posted. The

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reasonable inference is, that, this being the last day of the twelve months, the defendant did not intend to suffer the time to expire without exercising the option, though an extension of time might be refused. We will not endeavor to reconcile the testimony of the various witnesses respecting what was said and done at the subsequent interview. Our conclusion from the whole evidence is, that the extension requested was refused; that complainant considering, as he construed the contract, that the execution and delivery of his warranty deed would be full performance, offered to execute it, and demanded the payment of the purchase-money; and that defendant, in view of the pending suit, refused to pay or take the property on the mere delivery of his deed, but was willing and ready to pay on a good title being made. It does not appear whether or not the complainant had received the letter at this time. No allusion whatever was made to it. If it was intended to recall it, the complainant should have been informed of its transmission through the post, that he might be advised of his relation to the transaction, and act understandingly. The election to purchase was suffered to continue in the course of delivery and to be received without notification of an intention to recall it. A refusal to pay on the execution and delivery of the mere deed of complainant, while the adverse suit is pending, is not irreconcilable with the acceptance of the offer, and a readiness to comply on receiving a good title. A retraction should be as direct and explicit as the acceptance. Under the circumstances, there could be no effective retraction of an election, of which the complainant was ignorant, by a conversation, which was not directed to, nor had in reference to such election as having been already made; but rather as to what would be performance of the contract on the part of complainant.

But the tenor and result of the conversation have a material bearing on the respective rights and duties of the parties. It manifested a disagreement as to a proper construction of the contract. If the only duty devolved on complainant by the contract is to execute and deliver a warranty deed, without reference to the title, an option to purchase, on condition that a good title is given, would be a change of the terms proposed; and before the contract of sale would be concluded, complainant must notify defendant of his assent to the modification or change. But such is not the construction of the contract. By the law, and under the terms of the offer, the defendant's right was to have such title, as will constitute him the owner of the land, clear of encumbrances—an indefeasible title. The court will not force on a purchaser a conveyance, the covenants of which are broken *eo-instanti* on its execution.—*Hunter v. O'Neil*, 12 Ala. 37; *Cullom v. Br. Bk. of Mobile*, 4 Ala. 21;

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Stone v. Fowle, 22 Pick. 166; *Swan v. Drury*, *Ib.* 485. The acceptance, therefore, worked no modification or alteration in the terms of the offer, and the contract of sale was complete on the receipt of the letter by complainant without objection; a reasonable time being allowed to each party, in which to perform.

But, though the contract of sale is complete, the defendant can not be said to be in default, unless the complainant was ready, willing and able to give him such title as he was entitled to have. The contract of sale, as alleged in the bill, is founded on mutual and concurrent conditions. The execution of the deed, and the payment of the purchase-money, were to be contemporaneous acts; each party being bound to perform at the same time; and neither bound to performance unless the other party was ready and able to perform his part of the contract. When "the contract of purchase is founded on mutual and concurrent conditions—when the payment of the purchase-money and the execution of the stipulated conveyance are intended to be concurrent and contemporaneous acts, each party bound on his part to perform at the same time; the bill of the vendor so far partakes of the character of a bill for specific performance, that he must aver his readiness and ability to perform on his part at the appointed time, or the vendee is not placed in default."—*Burkett v. Munford*, 70 Ala. 423; *McKleroy v. Tulane*, 34 Ala. 78. In the case last cited, a decree was affirmed, sustaining a demurrer to a bill, brought to enforce a vendor's lien, on the ground that it did not allege a tender of such deeds as were called for by the contract. No future day for performance is fixed by the present contract. The election to purchase and notice must, in the nature of things, precede performance; and in such case performance in a reasonable time is allowed. The question then is, was the complainant ready and able to execute a title, on the delivery of which the defendant was bound to pay the purchase-money?

By assenting to the acceptance, on which the bill founds the right to relief, it is incumbent on complainant to be able and ready to make a good title, before performance by the defendant can be exacted. The answer alleges, and the fact is undisputed, that suit had been brought by an adverse claimant against the defendant and his agent, as tenants in possession, to recover two-thirds of the land in question. A purchaser will not be compelled to accept the deed of his vendor, when a suit is pending, in which an adverse claim is set up, until there has been a decision of the suit. He will not be forced to purchase a law-suit.—*Waterman Spec. Per.* § 412; *Earl v. Campbell*, 14 How. Pr. 330; *Doblis v. Norcross*, 24 N. J. Eq. 327. It appears that the suit has been determined against

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the plaintiff therein, but at what time—whether before or since the filing of the bill—is not shown. If undetermined at the time the bill was filed, it can not be maintained strictly and for the single purpose of enforcing a vendor's lien; as at the time it was brought, the complainant was not entitled to demand, and the defendant was not bound to pay the purchase-money—the claim had not matured.

But it may be regarded as a bill for specific performance, by compelling the vendee to accept a conveyance.—*Mumford v. Goree*, 70 Ala. 452. In such suit, it is sufficient if the vendor is able to make a good title at any time before a final decree. *Heppburn v. Auld*, 5 Cr. 262. When time is not an essential element of the contract, as when performance is not stipulated by a future limited day, actual tender of title, previous to the commencement of the suit, is not requisite. It suffices if the complainant is ready and willing, and offers in his pleadings to perform. Previous inability or neglect of tender will be considered as affecting only his right to costs. Though the defects in the title are not prominently put forward in the pleadings, the defendant is entitled to have an inquiry directed as to the title of a vendor of the lands in question.—*Fry Spec. Per.* § 824. Where the complainant is unable to comply when he commences his suit, the court, in the exercise of a sound and reasonable discretion, and as a condition precedent to granting specific performance, should require satisfactory assurance, that he is able to do all essential and material acts on his part to be done according to the terms of the contract.—3 Pom. Eq. Jur. § 1407. The title should be free from infirmity; a title on which the purchaser may repose in peace and which assures the marketable value of the property.—*Connell v. Andrews*, 35 N. J. Eq. 7. The specific objection made in the pleadings is the pending suit, with an averment of ignorance of the facts and inability to ascertain them. The action pending when the bill was filed, was ejectment, or a statutory action in the nature of ejectment. Two judgments are requisite to bar a subsequent action founded on the same title. Code, § 2969. An adverse claim under a deed had been asserted by suit, the judgment in which is not conclusive of the claim; and no exhibit of the title was made or offered. Under these circumstances it can hardly be said, that complainant's title is so free from doubt, or secure against litigation, as that the defendant should be compelled to accept it without further assurance. If the bill be considered a bill to enforce a vendor's lien, but partaking of the character of a bill for specific performance, so far as to require the complainant to offer a good title, the court should not have decreed a sale, as the defendant is paying full value, without first ascertaining that

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the complainant was able to execute the offer, which he is required to make and does make in his bill, especially when objection to the title is made. If the suit be treated as one for specific performance, it should appear to the satisfaction of the court, by a reference of the title or otherwise, that the complainant is able on his own part to perform the contract according to its terms. Should specific performance be granted, the court may, in order to do complete justice, hold the land bound for the purchase-money, and decree a sale, if not paid in a reasonable time.—*Beverly v. Larson*, 3 Mun. 317.

Reversed and remanded.

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Action for Damages for Breach of Contract.

1. *Executory contract—what not an abandonment of right to damages.* Under an executory contract of sale, the option being reserved to the purchaser, when the first installment of purchase-money falls due, to treat the contract as a lease, pay rent for the year, and restore the possession of the premises in as good condition as when received; the acceptance of rent and the possession by the vendor is not an abandonment of his claim to damages on account of the failure to restore the premises in as good condition as when received.

2. *When plea may be struck from file.*—When a plea is substantially defective, it may be struck from the files on motion, without putting the plaintiff to his demurrer.

APPEAL from Choctaw Circuit Court.

Tried before the Hon. W. E. CLARKE.

This was an action for damages commenced by L. L. Belsher, against Freeman T. Dicks, for an alleged breach of a written agreement made by the defendant, with plaintiff, on the 6th day of December, 1883. The plaintiff claimed that under said agreement he had put defendant into possession of a certain tract of land lying in Clarke county, with the improvements thereon, the property of plaintiff, under circumstances and upon terms which are set forth in the opinion of the court; that, during the tenancy of the premises by defendant, the improvements thereon were destroyed by fire, and that, though it was the duty of defendant, under said agreement, to restore, or to pay for the same, he refused, upon demand, to do so. It appeared that in the exercise of the option reserved by him in said agreement, the defendant had restored the place to the plaintiff, paying him rent therefor. The defendant demurred

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to the complaint as filed, on the ground, first, that under said contract the remedy of the plaintiff was to refuse the payment of rent, and the return to him of the possession of the place; second, that the contract only authorized plaintiff to refuse the reception of rent and return of possession of the premises. These demurrers were overruled, and the defendant excepted. The defendant filed the following pleas: 1. "And the said defendant, by his attorney, further says that sometime during the month of June, 1884, he and the plaintiff made and entered into another contract in reference to the land and premises described in the complaint, to the effect that said defendant return the said land and premises, and be released from said contract set up in said complaint, and defendant to hold the said land and premises under a contract for rent then made; and defendant avers that pursuant to said agreement, he turned over to plaintiff the aforesaid land and premises, and he so accepted them at that time, and of this defendant puts himself upon the country. 2. And the defendant further says that in pursuance of the stipulations contained in the contract set out in plaintiff's complaint, he elected, on or before the first day of December, 1884, to pay the sum of two hundred dollars as rent for said year on said premises, and return possession of the same to said L. L. Belsher, the plaintiff; and defendant avers that said Belsher received the payment of the said two hundred dollars as rent, and the possession of said premises, and now has possession of the same—and of this defendant puts himself upon the country." The plaintiff moved to strike the latter plea from the file, because it did not answer the complaint, which motion was granted by the court, and defendant excepted, and assigns as error the action of the court in overruling the demurrers, and striking the plea of the defendant from the file.

W. F. GLOVER, for appellant.

TAYLOR & ELMORE, *contra*.

STONE, C. J.—The agreement of December 6, 1883, between Belsher and Dicks, is an executory contract of sale and purchase of real estate, the purchase-money to be paid in five annual installments, the first to be paid December 1, 1884, and title to be made on complete payment. Dicks was to take immediate possession, and to pay the accruing taxes on the land purchased. The agreement contains this clause: "It is mutually agreed, that if on the 1st day of December, 1884, the said F. T. Dicks shall so choose, he may, in lieu of making the said payment, pay the sum of two hundred dollars as rent for 1884,

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the said F. T. Dicks then returning possession of said land to the said L. L. Belsher without the payment of any taxes thereon, and the place and improvements being returned in as good condition as now found, accidents of God excepted." This, then, was a contract of purchase by Dicks, with the option reserved to him of converting it into a leasehold estate.—*Collins v. Whigham*, 58 Ala. 438; *Wilkinson v. Roper*, 74 Ala. 140. The contract was signed by both parties. The present suit was brought on said contract, and the breach alleged is in the following language: "The defendant has failed, and though often requested so to do, still fails and refuses to comply with the following provisions thereof, to-wit: After having taken possession of said lands and improvements under said contract, and elected to pay rent for the year 1884, as therein provided, and paid said rent as stipulated therein, he has not returned the place and improvements in as good condition, accidents of God excepted, as it was when said contract was made, and when he took possession thereof, in this: That the dwelling house, kitchen and dining room and office, and an ice house and bath house, all of which were on the premises when the contract was made, and when he went into possession, were burned by fire during his tenancy during the year 1884; and the defendant, though requested so to do, has failed and refuses to rebuild said dwelling house and outhouses above mentioned, to the damage," &c. There was a demurrer to the complaint, the point of which is, that by receiving rent, and receiving back the possession of the premises, the plaintiff had disabled himself to sue for the failure to return the place and improvements in the same condition as when received, the acts of God excepted. The demurrer was overruled. Defendant then pleaded the same facts in bar of the action. This plea, on motion of plaintiff, was stricken out by the court, because it was no answer to the complaint. These rulings, presenting substantially but one question, are the alleged errors complained of. It is not the law that the acceptance of the performance of one service or duty when two are due, is an abandonment of all claim of damages for the service not performed.—*Robinson v. Bullock*, 66 Ala. 548. The plea being fatally defective in substance, the court did not err in striking it from the file, without putting the plaintiff to his demurrer.

Affirmed.

Bell v. Sampey.***Ex parte James M. Bell.****Motion to Enter Up an Award.**Application for Mandamus.*

1. *Award without order of court ; no appeal from.*—An award made by arbitrators in a cause pending in the Circuit Court, without an order of said court, will not be entered as the judgment of the court; and an appeal from the action of the judge, in refusing to enter it as such, is unauthorized by the statute, and will not lie.

2. *Mandamus* refused on the authority of *Ex parte Dudley*, 79 Ala. 187.

APPEAL from the Circuit Court of Chilton.

Tried before Hon. JAMES E. COBB.

James M. Bell brought suit at the October term, 1885, of Chilton Circuit Court, against J. L. Sampey for damages, and while said cause was pending in said court, the parties entered into a written agreement to leave the matters in controversy between them to certain named persons, whose decision should be entered as the judgment of the Circuit Court in the cause.

The arbitrators having awarded damages to Bell, without any rule or order of court authorizing the submission to arbitration, the Circuit Court refused, upon motion, to enter said award as its judgment. To this action of the court Bell excepted, and assigns the same as error.

Mandamus was then applied for, and denied.

W. E. JOHNSTON, and WATTS & SON, for appellant.

WM. F. COLLIER, for appellee.

SOMERVILLE, J.—The first of these cases is an appeal taken from the action of the circuit judge refusing to enter the award of the arbitrators as the judgment of the Circuit Court. Such an appeal is unauthorized by the statute and will not lie, and the motion to dismiss it must be sustained on the authority of *Dudley v. Farris & McCurdy*, where the precise question arose and was decided at the present term.—Code, 1876, § 3547;

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Collins v. L. & N. R. R. Co, 70 Ala. 533; *Dudley v. Farris & McCurdy*, 79 Ala. 189.

The *mandamus* applied for in the second of the above causes must also be refused upon the authority of *Ex parte Dudley*, 79 Ala. 187, present term. We there held, that a submission to arbitration of matters involved in a pending suit, without any order or rule of court authorizing it, was not a statutory award. In the same case we decided that the court had no authority to enter up as its judgment a common law award, or any other than an award rendered in substantial compliance with the provisions of the statute, unless by solemn consent of the parties given in open court. A consent given out of court, and revoked before the entry of the consent-judgment based on it, will not answer the purpose.

The appeal in the first case is dismissed. The application for *mandamus* in the second case is denied.

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Statutory Real Action in Nature of Ejectment.

1. *Evidence on former trial; when admissible on subsequent trial, witness having died.*—The conditions on which the evidence of a deceased witness on a former trial may be reproduced on the trial of a subsequent suit, are that the matters in issue, and the parties are essentially the same in both actions. Parties, as thus used, comprehend privies in blood, in law or in estate.

2. *Same; nature of privity essential to admissibility.*—When, the other conditions existing, the admissibility of such evidence depends on the question, whether the parties to the two trials are privies in estate, there must be such privity as could make the judgment in the former, evidence in the subsequent action.

3. *When judgment against tenant evidence against landlord.*—A judgment against a tenant is not evidence against the landlord in a subsequent action for the recovery of possession, unless he had notice, or was admitted to defend, or did actually defend.

4. *Privity in estate; what constitutes.*—To constitute one person a privy in estate to another, such other must be a predecessor in respect to the property in question, from whom the privy derives his title; a mutual or successive relationship of rights.

5. *As to title, the grantees of landlord and tenant of landlord are strangers.*—The grantees of a landlord derive no title through him from a former tenant; for the purposes of title, they are entire strangers—evidence for or against the one, is therefore, inadmissible for or against the other.

APPEAL from the Circuit Court of Tallapoosa.
Tried before the Hon. JAMES E. COBB.

[Patton et als. v. Pitts et als.]

This action was brought by appellees to recover of the appellants, who were defendants in the court below, the land described in the complaint and damages for the detention thereof. Some of the defendants disclaimed, and others plead not guilty. Upon the trial the jury found for the plaintiffs the land sued for, and gave damages for its detention. A writ of possession was ordered to issue.

The plaintiffs derived their title through a deed executed by the sheriff of Tallapoosa county, on a sale of the lands claimed, under an order of sale from the Circuit Court to sell said lands as the property of Edward S. Yarbrough; at which sale the plaintiffs were purchasers. To show title in Edward S. Yarbrough, at the time of the sheriff's sale, plaintiffs offered in evidence a deed executed by B. T. Yarbrough to Edwin Yarbrough on the 25th of August, 1874. The deed was duly signed and acknowledged on the 13th of March, 1875, and filed for record on the 15th of March, 1875.

The defendants claim under a deed executed by the sheriff, on a sale made by him, on the 12th of March, 1875, under an order of court to sell the lands in controversy, as the property of B. T. Yarbrough. At this latter sale, one F. A. Vaughan, was the purchaser, receiving the sheriff's deed on the same day. Defendants were purchasers from Vaughan. The bill of exceptions recites, that after said deed from B. T. Yarbrough to Edwin S. Yarbrough was admitted in evidence, the defendants offered to prove that said deed was not delivered to Edwin S., or any one for him, till the same was filed for record, as above stated, and after the sale of the land as the property of B. T. Yarbrough. To prove the non-delivery of said deed, defendants offered to show by a witness, that on the trial of a suit in ejectment, previously had in the Circuit Court of Tallapoosa county, wherein Edwin S. Yarbrough was plaintiff, and Phillip Avery, who was the tenant of the said F. A. Vaughan, was defendant, to recover these same lands, the said B. T. Yarbrough testified as a witness in said cause, that after signing the deed (offered in evidence by plaintiffs) in August, 1874, he kept the same at his house, and delivered it to no one; that he had the justice of the peace, B. F. Hammock, come to his house on the 13th of March, 1875, and that he then and there acknowledged it before said Hammock, and filed the same himself for record with the judge of probate on the 15th of March, 1875. It was shown that said judge of probate, Hammock, and B. T. Yarbrough were dead.

To the introduction of this evidence as to what B. T. Yarbrough testified to on said former trial, plaintiffs objected and the court sustained the objection. To this action of the court, defendants excepted, and assign the same as error.

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OLIVER & GARRETT, for appellants.

J. M. CHILTON, and J. A. TERRELL, *contra*.

CLOPTON, J.—The sole question, raised by the assignment of errors, relates to the ruling of the court on the admissibility of evidence. The suit is a statutory action to recover the possession of lands. The plaintiffs derive title by purchase at a sale of the lands by the sheriff under an execution at law, as the property of Edwin S. Yarbrough. The defendants claim by conveyances from Vaughan, who purchased them at a sale by the sheriff under an order of court, as the property of B. T. Yarbrough. The main contention between the parties was, whether a deed made by B. T. Yarbrough to Edwin S. Yarbrough, bearing date August 25, 1874, was in fact delivered prior to Vaughan's purchase, which occurred March 12, 1875. On the trial of a former action brought by Edwin S. Yarbrough against a tenant of Vaughan to recover the lands, B. T. Yarbrough testified to facts tending to show the deed was not delivered until March 15, 1875. The witness having died, the defendants offered to prove what he testified in respect to the delivery of the deed on the former trial. The evidence was excluded by the court.

The conditions, on which the evidence of a deceased witness on a former trial may be reproduced on the trial of a subsequent suit, are that the matters in issue, and the parties are essentially the same in both actions—parties as thus used comprehending privies in blood, in law, or in estate. *Cleveland v. Huey*, 18 Ala. 343; *Goodlett v. Kelly*, 74 Ala. 213. A mere technical or nominal variation of parties will not exclude the evidence; but the adversary parties on both trials must be substantially the same. It is not sufficient, that the party, against whom the evidence is offered, was also a party to the former action. The evidence, being hearsay, is *prima facie* inadmissible, and it is incumbent on the party offering it to establish the existence of the conditions, on which its competency depends.

Passing other considerations, if it be conceded, that the plaintiffs are privies in estate with Edwin Yarbrough in the sense of the rule, which we do not decide, the question as thus presented is, whether the evidence of a deceased witness on the trial of an action of ejectment against a tenant may be reproduced on a subsequent trial between privies in estate to the plaintiff in the first suit, and the vendees of the landlord of the tenant? When, the other conditions existing, the admissibility of such evidence depends on the question, whether the parties to the two trials are privies in estate, there must be

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such privity as could make the judgment in the former, evidence in the subsequent action. *Bryant v. Urven*, 2 Stew. & Por. 135; 1 Whar. on Ev. § 177. The record does not disclose, that the landlord had any notice of the suit, or that he appeared and assumed, or joined in the defense. A judgment against the tenant is not evidence against the landlord in a subsequent action for the recovery of possession, unless he had notice, or was admitted to defend, or in fact made defence. In such case, the judgment is *res inter alios actae*. *Smith v. Gayle*, 58 Ala. 600; *Chant v. Reynolds*, 49 Cal. 213; *Barlett v. B. G. L. & Co.*, 122 Mass. 209.

To constitute one person a privy in estate to another, such other must be a predecessor in respect to the property in question, from whom the privy derives his right or title—a mutual or successive relationship. 1 Green. on Ev. § 189; *Hunt v. Haven*, 52 N. H. 162. As the lessor derives no right or title from the lessee, and does not claim under him, the vendees of a landlord derive none through him from a former tenant. For the purposes of title, they are entire strangers. Judged by this rule, the defendants are not privies in estate to the defendant in the former action. Not being privies in estate, the evidence would not be admissible against the defendants, and is not admissible in their favor. *Morgan v. Nicholls*, L. R. Q. C. P. 117; *Foster v. Derby*, 1 A. & E. 783. The record does not affirmatively show the existence of the conditions, on which the admissibility of the evidence depends.

Affirmed.

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Statutory Action in Nature of Ejectment.

1. *Secondary evidence of lost deed*.—As to the alleged deed from Cothran & Elliott to Cadow, the court holds, as on the former appeal (78 Ala. 150), that the proof of its existence and destruction was sufficient to let in secondary evidence of its execution and contents.

2. *Proof of deed executed in another State*.—As to a deed executed in Georgia, the presumption is that the subscribing witnesses also resided there; and it is not necessary to produce them, nor to account for their absence, before adducing secondary evidence of its execution.

3. *What not statement of opinion*.—When a witness testifies to the existence and subsequent destruction of a deed which he has seen and read, and further states, "The paper writing now shown me is, I verily believe, a true copy of said deed," this is not the statement of a mere opinion, and does not render his testimony inadmissible.

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4. *When copies of original entries are admissible.*—When a book containing original entries, which are competent evidence, is shown to be beyond the jurisdiction of the court, copies of them, shown to be correct, are admissible.

5. *When oral proof of written transfer received.*—The fact that a transfer of judgments and claims was made, though in writing, may be proved by parol; though secondary evidence of the contents can not be received, unless the absence of the writing is accounted for.

APPEAL from the Circuit Court of Etowah.

Tried before the Hon. JAMES E. COBB.

This action was brought by James M. Elliott, as surviving partner of the former firm of Cothran & Elliot, against A. C. Dyche and B. F. Reynolds, to recover certain lands described in the complaint, and was originally commenced on the 10th December, 1879, was tried before the Hon. Leroy F. Box, and brought by appeal to this court, reversed and remanded. On the second trial the evidence and proceedings were not materially variant from those occurring on the former trial of this cause, which are so fully reported in 78 Ala. 150, that it is not deemed requisite to repeat them here.

REEVES, TURNLEY, RICE, for appellant.

J. B. MARTIN, McSPADDEN & CARDEN, *contra*.

CLOPTON, J.—The questions raised by many of the numerous assignments of error were ruled on, when the case was before us on a former appeal (78 Ala. 150), which we do not deem it necessary to reconsider. It was clearly competent for the witness, Cadow, to testify that his firm, Cadow, McKenzie & Co., had sent by mail the original deed, alleged to have been made by the plaintiff to him, to their attorneys at Ashville. The affection of his sight, which disabled him to read the papers, goes to the sufficiency of his evidence, and not to its competency. The letter of July 9, 1862, from the firm to the attorney, which was read in evidence without objection, tended to establish the transmission of the deed, and to corroborate the evidence of Cadow. This evidence, in connection with the testimony of Rope, the survivor of the firm of attorneys, constitutes sufficient proof of the existence and destruction of the original deed to let in secondary evidence of its execution and contents.

We previously held, that the deed having been executed in Georgia, the presumption is, the subscribing witnesses resided in that State; and in the absence of counter testimony, the defendants were excused from calling them, or accounting for their absence; and as the deed was destroyed, they could resort

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to other proof of its execution. This fact the witness Cardow was competent to prove. Objection, however, is taken to his answer—"the paper writing now produced and shown to me, marked A. is, I verily believe, a true copy of the deed delivered to me by Cothran & Elliott"—as legal evidence of the contents of the deed. "Exhibit A" is a copy of a deed purporting to have been made by Cothran & Elliott to the witness, the firm name having been signed by the plaintiff, who was a member of the partnership. We suppose the objection is founded on the words of the witness—I verily believe. These words, in the connection in which they are used, are not the expression of an opinion in the proper sense. It was so ruled in *Head v. Shaver*, 9 Ala. 789, where the witness testified, that he had seen the note in the hands of the nominal plaintiff, more than eighteen months before, and *believed* it to be the same note, but could not say positively. It is said: "It is the assertion of the existence of a fact, qualified by the admission that the recollection of the witness is not so clear and distinct, but that he may be mistaken." The qualification is, in such case, for the consideration of the jury, in determining to what weight the evidence is entitled. In the answer of Cadow, there is no qualification. It is not the expression of a belief, such as amounts merely to an opinion, or judgment. In the answer to the next succeeding interrogatory, the witness states that "Exhibit A" is a copy of the deed, without modifying it with any expression of belief. The expression, "I verily believe," as employed in the answer, is equivalent to the expression of the best recollection of the witness.

On the former appeal, it was held, that the entries made by McKenzie, who is deceased, are admissible evidence on any issue involving the transaction to which they relate. One of the issues was, whether plaintiff had made a deed or bond for title, and whether the lands had been paid for. To this issue the entries were relevant; and the books in which the original entries were made, being beyond the jurisdiction of the court, copies shown to be correct are admissible.—*Gordon, Rankin & Co. v. Tweedy*, 74 Ala. 232.

Parol evidence is admissible to prove the fact, that a transfer of the judgments and claims against Garrett was made by the plaintiff, and delivered to the witness at or about a particular time. When it appears that the transfer is in writing, secondary evidence of the contents can not be given, unless the absence of the original is accounted for. But it does not seem there was any attempt to prove the contents of the transfer. Besides; the plaintiff, in his own testimony, admits a transfer was made. The admission of the fact dispensed with the ne-

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cessity of producing the writing.—*McGeehee v. Hill*, 1 Ala. 140; *Paysant v. Ware*, 1 Ala. 160.

We discover no error in the rulings of the court.
Affirmed.

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Action on the Case for Malicious Prosecution.

1. *Statute of limitations; new action commenced within twelve months after reversal of former judgment.*—By express statutory provision (Code, § 3235), a new action may be commenced within twelve months after the reversal of a judgment in a former action, notwithstanding the lapse of time otherwise sufficient to effect a bar; and if the statute of limitations is pleaded to the new action, a replication setting up the former action, reversal, &c., is sufficient.

2. *Same; when former action was vexatious, or instituted during pendency of another.*—This statute is remedial, and must be liberally construed; and though the former action was instituted while another was pending on the same cause of action, and was characterized by this court as vexatious and oppressive, notwithstanding the premature commencement of the first, this does not avoid the replication, nor take the case out of the statutory exception.

3. *Construction of statute as to cases within letter, but not within spirit.* There are cases which require the courts to disregard the letter of a statute, when manifestly opposed to its spirit; but, to justify this, there must be a moral conviction, based on the unreasonableness of the application sought to be made, that the legislature could not have intended such result, and it is not enough that the statute appears to be not promotive of the best interests of society or individuals.

APPEAL from the Circuit Court of Bullock.
Tried before the Hon. H. D. CLAYTON.

J. T. NORMAN, for appellant.

WATTS & SON, *contra*.

STONE, C. J.—This suit is an action on the case for a malicious prosecution. The defendant pleaded in bar the statute of limitations of one year.—Code of 1876, § 3231. To this plea the plaintiff replied that he had instituted a suit against the defendant on the same cause of action within a year after the accrual of the same, that he had prosecuted said suit to a judgment, that judgment was rendered in his favor, that such judgment was reversed on appeal to this, the Supreme Court, and that within one year from the reversal of such judgment

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the present action was commenced.—Code, § 3235. The defendant filed a rejoinder, in which he set up that plaintiff had instituted two suits against him on the same cause of action as that on which the present suit is founded; the first in April, 1881, and the second in August, 1881. Each of these suits was within the year after the accrual of the cause of action. In the second of these suits the recovery was had, which was reversed in this court. The second of these suits was instituted while the first was pending. The defendant, Foster, pleaded the pendency of the first suit in abatement of the second, and the plaintiff demurred to the plea. Plaintiff afterwards dismissed his first suit; and subsequently the Circuit Court sustained a demurrer to the plea in abatement. A trial of the second suit was then had, and the recovery in that suit was the one which this court reversed.—*Foster v. Napier*, 73 Ala. 595. The foregoing facts constitute the substance of the rejoinder in this cause. The plaintiff demurred to this rejoinder, which being overruled, he declined to take issue, and judgment was rendered for the defendant. The ruling on the demurrer is the sole question presented by this appeal.

For appellant it is contended that this case falls directly within the healing influence of § 3235 of the Code of 1876. This we think must be admitted, so far as the letter of the statute is concerned. Every one of the conditions required by the statute is shown to be present in this case. Suit commenced in less than twelve months after the cause of action accrued, recovery and judgment in favor of the plaintiff, reversal of that judgment in this court, and the present suit instituted in less than twelve months after such reversal. The replication was a complete avoidance of the plea, and a demurrer to it would have been overruled. No question is here made on its sufficiency.

It is contended for appellee, however, that the suit in which a recovery and reversal were had, was itself a second suit between the same parties on the same cause of action, brought oppressively and vexatiously while the former one was pending; and it can not be supposed the legislature intended the statute should reach such a case as this. The argument is that the present case is not within the spirit of the enactment. There are cases which require us to disregard the letter of a statute, when they are manifestly opposed to its spirit. It should be a clear case, however, to justify the application of this rule. Conviction that a statute is not promotive of the best interests of society, or of individuals, is not enough. There must be a moral conviction, based on the unreasonableness of the application sought to be made, that the legislature could not have intended such result. Does that appear in the case presented

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in this record? Is it not manifest that the statute was intended to relieve parties of the consequences of some error, mistake, or oversight, in bringing or prosecuting the first suit? If no oversight or mistake had been committed in the first suit, it would seem there could be no occasion for the statute; for after reversal, the error could be avoided or corrected on a second trial. It is only in cases where the error, mistake or oversight is fatal to the right to maintain the action in the form in which it is first brought, that it can ever become necessary to invoke the provisions of the statute. In the case of *Givens v. Robbins*, 11 Ala. 156, a mistake had been committed much grosser than the one fallen into in this case. The mistake in that case operated a discontinuance of the entire action. Yet it was held the statute was a complete answer to the statute of limitations, which had otherwise perfected a bar. In that case, and other later rulings, this court is fully committed to the doctrine that the statute we are considering is remedial, and must be liberally construed.—*Hill v. Huckabee*, 70 Ala. 183.

The argument most earnestly urged in favor of the sufficiency of the rejoinder is, that the second suit brought in this case was oppressive and vexatious—so characterized by this court—and that the legislature can not be supposed to have intended to confer a right to sue, based on an act which is vexatious and oppressive.—*Foster v. Napier*, 73 Ala. 595, is invoked as affirming that the second suit between these parties on this identical cause of action was oppressive and vexatious. The argument misapprehends, to some extent, the purpose this court had in view in the employment of the language relied on. It was not intended to characterize the second suit as oppressive in fact. We said it was not an inquiry of fact, but a conclusion of law. We were simply stating the reason why a second suit can not be brought between the same parties on the same cause of action, while a former one is pending, in which the same issues can be tried. A second suit in such conditions is unnecessary, and the law denounces as oppressive such double vexation. Carrying the argument to its extreme length, it will condemn the statute—Code, § 3235—as an unwise enactment; for in its very purposes and terms it provides for bringing a second suit, after one has already been brought and prosecuted, to test the same disputed question of right. This is, itself, double vexation.

The bar the statute of limitations erects is against the inert and dilatory. It proceeds on the theory that one having a meritorious claim will assert it within a reasonable time; and the varied provisions of the statutes are but the expression of the legislative judgment as to what is a reasonable time for in-

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stituting the several forms of action. For bringing actions like the present one, which sounds in damages merely, the limitation is a short one. But, experience soon disclosed that meritorious suits were sometimes brought and prosecuted to judgment, which, through some mistake or oversight, or erroneous ruling of the trial court, were subject to be, and were arrested or reversed, on some point which could not be remedied on another trial. The action, as brought, must fail. In the meantime the statute of limitations, if time be computed from the accrual of the cause of action, had perfected a bar. The plaintiff had not been inert, had not been dilatory. Without some remedial legislation a righteous cause of action is lost to the plaintiff, through no dilatoriness on his part. Cases of this kind doubtless dictated the legislation, which has expression in § 3235 of the Code of 1876.—*Givens v. Robbins*, 11 Ala. 156. The saving, remedial benefit it secures, was not intended for cases in which no errors or mistakes occur. They have no need for such statute. It was intended for just such case as we have in hand. The Circuit Court erred in overruling the demurrer to the defendant's rejoinder.

Reversed and remanded.

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Action for Malicious Prosecution.

1. *Conduct and language of prosecutor connected with arrest ; when admissible as tending to establish malice.*—In an action for a malicious prosecution, it is competent for the plaintiff to show any acts, conduct or words of the defendant on the day of the plaintiff's arrest, and while he was in custody, tending to establish malice or other improper motive in the prosecution, or a purpose to vex or oppress the plaintiff; but, the defendant not being liable for any acts or declarations of the sheriff, beyond the usual and proper mode of executing the process, unless he instigated, authorized or participated in them, the declarations of the sheriff to the plaintiff, not made in the presence of the defendant, are not competent evidence for the plaintiff.

2. *Impeachment of witness; limitation of inquiry into character.*—In impeaching a witness, the inquiry is not limited to his general character for truth, but may be extended to his character generally.

3. *Advice of counsel ; when constituting a defense.*—To make the advice of counsel a defense to such action, it is not necessary that the prosecutor should have made a full and fair disclosure of all the facts in the case, but only of all the facts known to him, or which he could have ascertained by reasonable diligence.

4. *Parol license to pass through lessor's lands ; when revocable.*—When a rented field is accessible by a public road, permission to use a shorter

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pathway through the lessor's other lands will not be implied from its greater convenience; and its use without objection is no more than a parol license, which is revocable at pleasure; but, if the use of the pathway was part of the contract, or was held out as an inducement to the contract, the lessor would be estopped from prohibiting its rightful use by the lessee or his servants.

5. *Indictment not evidence of probable cause.*—The finding of an indictment by a grand jury is not *prima facie* evidence of probable cause.

APPEAL from the Circuit Court of Pike.

Tried before Hon. JOHN P. HUBBARD.

This was an action brought by Joseph A. Bates in the court below, to recover damages of the defendant, P. A. Motes, the appellant here, for an alleged malicious prosecution; there having been a previous trial of the cause, and a reversal, on appeal, by this court. Issue was joined on the plea of "not guilty." It was shown by the plaintiff that at the Fall term, 1880, he had been arrested and tried for an assault and battery upon the body of the said Motes, under an indictment procured by Motes, whose name was endorsed as prosecutor thereon; and that said trial resulted in the acquittal of said Bates. During the examination of the plaintiff, who was testifying in his own behalf, witness was asked by his counsel in regard to a conversation between himself and the sheriff, during the custody of the former under said prosecution, and this question was asked: "Were you begging the sheriff not to put you in jail?" Defendant objected to this question, which objection was overruled by the court, and defendant excepted. Witness answered that he asked the sheriff not to put him in jail; and defendant moved to exclude his answer. The court refused to exclude, and defendant excepted. A diagram was offered in evidence showing the location of the parcels of land rented by W. E. Bates from defendant, which was cultivated by said W. E. Bates and the plaintiff. The evidence showed that at the time of the alleged assault and battery, the plaintiff and his brother, W. E. Bates, were cultivating these different parcels of land; that one parcel of three acres was near a mill, and on the east side of the mill creek; and another parcel of twelve acres was distant several hundred yards, down and on the opposite side of the creek; there was a path leading across the creek, and down a ditch, upon the lands of defendant, from the three acre tract to the twelve acre tract, which was somewhat nearer than along the public road and wagon way, which afforded communication between the places. Plaintiff claimed the right to pass over the lands of defendant, by this pathway, in going from one field to the other—which was denied by the defendant. The testimony shows that on the 10th of July, of the year of the lease, plaintiff was passing along this pathway, going to work

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in the twelve acre field, when he was accosted by the defendant, with his gun, and accompanied by his son, and ordered to go back. A fight ensued in which plaintiff cut defendant with a razor, and was himself struck with the gun by defendant, whose son also struck plaintiff with a stick. Out of this difficulty grew the criminal prosecution which constitutes the basis of the present action. There was conflicting evidence as to the terms of the lease contract in regard to plaintiff's right to go along the pathway. The lessee, W. E. Bates, testified that at the time of the renting, the defendant, Motes, stated to him that when going to the twelve acre field with a wagon or a horse, he, Bates, would have to go the roadway; but that nothing was said about his not using the pathway when walking, and that witness had been using said path as a foot way habitually up to the time of the difficulty of the 10th of July, and that he had heard of no objection from Motes until about a week before that date. The defendant, Motes, testified that he expressly reserved the pathway for the private use of himself and family, and stated to plaintiff, at the time, that such was his uniform custom with his tenants renting these fields. Plaintiff sought to impeach the testimony of the defendant by showing his bad character; and, in vindication, defendant offered a witness, Folmar, who was asked by defendant's counsel: "Do you know the general character of the defendant?" to which question plaintiff objected, and the court having sustained the objection, defendant excepted. It was further shown by the defendant that before commencing the prosecution complained of, he consulted his attorney, who advised him that he had good cause for instituting the proceeding; and that he had acted in good faith in the whole matter of the prosecution. This being substantially all the evidence, the plaintiff asked the following written charges, which were given by the court: 1. "The defendant's right to forbid any one entering his premises does not apply to one who has the right to enter by subsisting contract or agreement; and if the jury believe that at the time of the renting the defendant induced W. E. Bates to believe that in entering the larger field, he would have to go the road only when he had a horse, or was driving a wagon, then the plaintiff had a right to go the path when he was walking." 2. "The advice of counsel will not protect the defendant, unless he has shown that he made, at the time the advice was sought, a full and fair disclosure of all the facts in the case, and the advice must have been sought in good faith, and not as a cover to the prosecution." To the giving of these charges the defendant severally excepted.

The defendant asked the following charge in writing: "If the jury believe from the evidence that the grand jury of Pike

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county found a true bill against the plaintiff, Bates, this is, of itself, *prima facie* evidence of probable cause for the prosecution, although such prosecution resulted in an acquittal." The court refused to give this charge, and defendant excepted. The rulings of the court adverse to defendant, to which exceptions were reserved, and the giving of the charges asked by plaintiff, are now assigned as error.

N. W. GRIFFIN, for appellant.

GARDNER & WILEY, *contra*.

CLOPTON, J.—When this case was before the court on a former appeal (74 Ala. 374), it was held, that it is permissible for the plaintiff to prove the conduct and movements of the defendant on the day of the plaintiff's arrest, and while he was in custody, endeavoring to give bail. The ruling is founded on the settled doctrine, that it is competent to show any acts, conduct or words of the defendant, tending to establish malice, or other improper motive in the prosecution, or that he was moved by a purpose to vex, harass or oppress the plaintiff, as a ground for allowing exemplary damages. But, on the last trial, the plaintiff went beyond this, and offered evidence of a conversation between himself and the sheriff in front of the jail yard, which was admitted by the court, against the objection of defendant. The defendant can not be held responsible for any act or declaration of the sheriff, beyond the scope of the usual, proper and legal mode of executing such process, which the defendant did not instigate, authorize, or participate in. The only purpose, for which the conversation could have been introduced, was to excite the sympathy of the jury, and induce them to give heavier damages. The evidence being *prima facie* irrelevant, it is incumbent on the plaintiff to make it relevant. As there is an absence of evidence tending to show that the defendant had any knowledge of the purport of the conversation, or any connection therewith, it should have been excluded.—*Jackson v. Smith*, 75 Ala. 97; *Lienkauf & Strauss v. Morris*, 66 Ala. 406.

What was the objection to the question propounded to the witness, Folmar, we are not informed. We suppose it went to the generality of the interrogatory. There has been, and still is, an irreconcilable conflict of opinion, as to the proper form of the question to be propounded to an impeaching witness, some of the authorities holding, that it should be restricted to general character for truth, and others approving the general inquiry. The form of the question is a rule of practice, which was defined in *Ward v. State*, 28 Ala. 53, where the general

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inquiry, substantially the same as in the present case, was held to be proper, and has since been regarded as the settled rule. *Holland v. Barnes*, 53 Ala. 83. Such has been the practice too long to be now disturbed.

The charge relating to the advice of counsel as a defense is subject to criticism. It makes a requirement of the defendant more extensive than the rule. In order to avail himself of the advice of counsel, it is not requisite that he shall make a full and fair disclosure of all the facts *in the case*; but of all the facts bearing on the case, which he knows, or could have ascertained by reasonable diligence.—*Steed v. Knowles*, 79 Ala. 427; *Trowman v. Smith*, 12 Amer. Dec. n. 266. If any material, relevant fact is culpably withheld, or if the defendant did not act upon the advice received in good faith, he will be deprived of any protection to which he would, otherwise, be entitled.

On the facts presented on the former appeal, it was held, that the use of the pathway by the plaintiff, being by permission of the defendant, was only a parol license; and that such license, without consideration, is revocable at the will of the person by whom it is granted. The present record contains some additional testimony of what occurred at the time of making the contract, on which is based a charge respecting the right of the plaintiff to use the pathway. It appears that there were both a public road, and a private path over other land of the defendant, leading to the rented field. If there was no agreement, express or implied, that the lessee of the premises, might use the path, no implied obligation to permit its use arises, because of greater convenience, there being another accessible public way. It is true a parol license, coupled with an interest, may be irrevocable. If it was a part of the contract, so as to constitute its use the equivalent to an appurtenance to the rented premises, the defendant is estopped from prohibiting its use by the lessee or his employees, so long as the use was not abused. The defendant would also be estopped, if the use of the path was held out to the lessee as an inducement to rent the field, on which he relied and acted. But a mere representation, that when he went to the field with a wagon, or home, he could go the roadway, followed by subsequent use of the path, without objection, when nothing was said about the pathway, and the use of it was not an inducement on which the lessee relied and acted, or was not an element of the contract, would amount to no more than a parol license, revocable at the will of the defendant.—*Riddle v. Brown*, 20 Ala. 412; *Huff v. McCauley*, 53 Pa. St. 206; *Nettleton v. Sikes*, 8 Met. 34; 1 Wash. on Re. Prop. 628–638. It must be observed, however, that a witness can not testify to an un-

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communicated motive or inducement. He must state the facts, and the jury must draw the conclusion.

While a parol license, being in its nature personal, ordinarily is not assignable, the use of the path by an employee of the lessee, who is engaged in cultivating the field, is not an assignment of the license. If it be conceded, however, that the inducement is sufficiently stated in the charge, the hypothesis omits the material facts, whether the lessee acted on the faith of the inducement, and whether the plaintiff was his employee. Whatever may have been the right of the lessee to use the path, it did not enure to the plaintiff, unless he was, at the time, employed on the rented premises.

There are respectable authorities, which hold, that a true bill found by a grand jury is *prima facie* evidence of probable cause, in an action for a malicious prosecution.—*Bell v. Percy*. 11 Ire. L. 233; *Brown v. Griffin*, Cheves 32. We are unwilling to follow these authorities, which can not be supported by satisfactory reasons, or maintained on principle. A judgment, on the merits, except in proceedings *in rem*, is not evidence against one, who had no notice, and of whose person the court did not have jurisdiction, of any fact, other than its existence. A judicial recognition of a fact is not a self-disserving admission by a party, who has had no opportunity of being heard. The proceedings of the grand jury are protected by the seal of secrecy, unless their disclosure is necessary to the public interests, or to the maintenance of private rights. An indictment found is, by statute, prohibited to be entered on the minutes, and is not to be inspected by any person, other than the presiding judge, the solicitor, and the clerk of the court, until the defendant has been arrested, or has given bail for his appearance. The finding of an indictment is an *ex parte* proceeding, conducted with closed doors, and its privacy secured by solemn oath. While an indictment is an accusation in writing, charging a person with an indictable offense, presented by a component part of the court; though it is a judicial affirmation, that the evidence before the grand jury is sufficient to put him on trial before a petit jury; it is an accusation and affirmation founded on such evidence as the prosecuting officer, the grand jury, and the prosecutor, if any, may see proper to select and adduce; and it is important to impair, on the trial of the accused, the presumption of innocence. The person charged not permitted to be present; has no opportunity of being heard; can bring no evidence, and can not cross-examine the witnesses produced. To admit such judicial finding as *prima facie* evidence of probable cause will enable a malicious prosecutor, by his own evidence alone, or by manipulating other testimony, to arm himself with a *prima facie* defense against a subsequent

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action. The charge requested by the defendant was properly refused.

Reversed and remanded.

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Appeal from Final Settlement in Probate Court.

1. *Costs improperly charged against estate.*—Costs and expenses incurred in propounding and establishing the probate of a will, by a person who is not therein named as executor, and upon whom is cast no legal or moral duty to establish the will, are not a proper charge against the estate; and when such costs and expenses are incurred by one of the distributees, by agreement with the others, and letters of administration are granted to him, the adjustment of the matter between them, according to the agreement, is not within the jurisdiction of the Probate Court on the settlement of the administrator's accounts.

2. *Title to lands descends to heirs and vests in them immediately upon the death of the person who is seized and possessed of a heritable estate therein.*—On the death of a person who is seized and possessed of a heritable estate in lands, the title at once descends and vests in his heirs or devisees, subject to the widow's rights of homestead and quarantine, and to the exercise by the administrator of the statutory powers conferred on him; and with the title the right of possession passes, and the right to the rents and profits accruing until they are intercepted by the administrator; nor can the administrator hold them responsible for the rents and profits thus received.

3. *Receiver holds for benefit of parties.*—A receiver, in a chancery suit, holds for the benefit of the parties pending the suit, and, on its termination, for the benefit of the party who is ascertained to be entitled to the fund or property; and while the rights of a stranger, intervening *pro interesse suo*, will be protected, they can not be enlarged by reason of the receivership.

4. *When receiver's possession is that of heirs.*—A receiver of the rents and profits of real estate being appointed, pending a suit between the heirs at law and the surviving husband of the decedent, to which the administrator was not a party; on the termination of the suit in favor of the heirs, the possession of the receiver is their possession, and the rents and profits received by him can not be claimed by an administrator subsequently appointed.

5. *When administrator is estopped.*—One of the heirs being appointed administrator, and the moneys in the hands of the receiver being paid over to him by order of the chancellor, under an agreement among the several heirs, to be used and applied in payment of certain specified claims; the administrator will be personally estopped from denying that he had received the moneys for the specified purposes, and the heirs from denying his right to appropriate them according to the terms of the agreement; but the administrator can not be charged, on settlement of his administration, with the moneys thus received, as assets of the estate.

APPEAL from Dallas Probate Court.

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Heard before Hon. P. G. WOOD.

This was an appeal from the final settlement of Anna M. Gayle, as administratrix, with letters testamentary annexed, of the estate of Mary L. Gayle, deceased, had in the Probate Court of Dallas county; and arises out of certain rulings of said court, adverse to appellant, hereinafter stated.

The bill of exceptions shows that Mrs. Mary L. Gayle died about the 6th of October, 1871; that at the date of her death, and for some years afterwards, no will was produced, and letters of administration were regularly granted upon her estate. In the course of the administration, in the year 1876, it was agreed by the children of the decedent, that one of their number, Anna M. Gayle, the appellant, should institute proceedings to establish the lost will of their mother, they stipulating, in the event of success, to pay the expense of the proceeding. The will was established, and admitted to record in the Probate Court, in 1876; and, on appeal to this court, the decree was affirmed in 1878. Letters were issued to Anna M. Gayle in 1879. The property not administered, of Mrs. Gayle's estate, consisting exclusively of land, which belonged to her statutory separate estate, and which, by the will, was devised to her children. After her death, the husband of Mrs. Gayle was, in 1872, adjudged a bankrupt, and his supposed interest, purchased at the assignee's sale, by Conoly, who claimed the land, and accruing rents. Conoly was enjoined by bill in chancery, filed by the children of Mrs. Gayle, from taking possession and collecting the rents, and a receiver was appointed.

At the final settlement of the estate it was found that there was the sum of \$822.81, remaining in the hands of the administratrix for distribution, or \$164.56, for each of the five distributees. When the court was about to enter judgment against the administratrix for said sums, she moved the court that she be allowed to satisfy the shares of said distributees, by charging each distributee with his *pro rata* part of the expenses incurred at their instance, in establishing the will, which was shown to be \$902. This motion was refused, and the administratrix excepted. The said administratrix further moved to amend her account by striking from the debit side thereof the item of \$1,165.54, received by her, by decree of the Chancery Court, from the receiver in the Conoly suit, on the ground that said sum, being the rents of the land devised to the children of Mrs. Gayle, belonged to said devisees. To this motion some of the devisees consented, but the appellee William S. Johnson, objected. The motion was heard on evidence, and the court refused to grant it, and held that said administratrix was chargeable with said sum. To this ruling the administratrix excepted. Some of the devisees consented to have their dis-

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tributive shares satisfied by their share of the expense of establishing the will; appellees objecting. There were other rulings of the court excepted to by the administratrix not necessary to be set out.

From the adverse rulings above stated this appeal is taken, and the same are assigned as error.

BROOKS & ROY, for appellant.

SATTERFIELD & YOUNG, *contra*.

CLOPTON, J.—Whatever may be the privilege or duty of one, named as executor in a paper purporting to be a last will and testament, to propound it for probate, and to fix a charge upon the estate for any reasonable costs and expenses incurred in a *bona fide* effort to have the will established; one, not standing in any relation, which makes it either a legal or moral duty to the estate to establish the will, can not create a proper charge upon it for costs and expenses thus incurred. A charge can not be fixed upon an estate for costs and expenses incurred, though in reference to its property, by one, upon whom neither the law, nor the will, confers the privilege, or imposes a duty. Administration, on the death of Mrs. Gayle, had been granted in 1872, as if she had died intestate, no will having been found. While the estate was in course of administration thus granted, and several years after the grant, in October, 1876, an agreement was entered into between the children of Mrs. Gayle, that as the will of their mother could not be found, proceedings should be instituted by the appellant in her name to establish and have admitted to probate a copy of the will; the children agreeing, in case of success, to pay a proportionate share of the expense. Proceedings were accordingly instituted, which resulted in the rendition of a decree by the Probate Court in December, 1876, establishing the lost will and admitting a copy of it to probate, which decree was, at the December term, 1878, affirmed by this court. The appellant was not appointed administratrix until April, 1879. The evident purpose of the agreement to institute such proceedings, was to defeat the claim of Conoly to the life interest, which the husband of Mrs. Gayle would have had in her real estate, if she had died intestate, and his consequent claim to the rents, that had accrued in the hands of the receiver. The attorneys were employed by the children, no one of whom occupied any relation, which made it a legal or moral duty to the estate to give effect to the will. Under such circumstances, the expenses incurred by them for that purpose must be regarded as incurred for their personal benefit, and as constituting a personal charge on

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them. The settlement of the matter of the expenses between the children was without the jurisdiction of the Probate Court, and there is no error in disallowing the vouchers for such expenses.—*Henderson v. Simmons*, 33 Ala. 291.

The title to a heritable estate in lands descends *eo instanti*, and vests in the heir at law, on the death of the person seized with such estate, if there be no will giving it a different direction; and if there be such will, then in the devisee. With the title passes the right to the possession, and after accruing rents and profits, subject to the statutory powers of the personal representative. For the purposes of administration, and subject to homestead and quarantine rights, the personal representative may claim and take possession, let to rent, and receive accruing rents. Possession and control of the realty by the personal representative, suspends the right of the heir or devisee to possession, and the rights of action, which at common law descended with the land; but to thus suspend the heir or devisee's rights, the personal representative must actually take possession, or assert his right, and follow it up with the means necessary to establish it.—*Calhoun v. Fletcher*, 63 Ala. 574. The heir or devisee is entitled to the realty with all its incidents, until the personal representative exercises or asserts his statutory power, either to rent or sell.—*Masterson v. Girard's heirs*, 10 Ala. 60. As between the personal representative and the heir or devisee, the latter is not responsible for rents received or collected before the statutory power is asserted; for the reason, that he is in law the owner, and may receive and expend the usufruct, though the personal representative may intercept rents not actually received or collected.—*Chighizola v. Le Baron*, 21 Ala. 406; *Br. Bank at Mobile v. Fry*, 23 Ala. 770.

The land was the statutory separate estate of Mrs. Gayle. After her death, her husband, in 1872, was adjudicated a bankrupt; and his supposed interest in the land was sold by the assignee in bankruptcy, and purchased by Conoly, who asserted his claim to the land and to the rents accruing thereafter. Thereupon, in September, 1873, a bill in equity was brought by the children, as heirs-at-law, to enjoin Conoly from setting up any claim to the land and from collecting the rents, and praying the appointment of a receiver, and that the possession of the land and rent notes be turned over to the receiver for their benefit. A receiver was appointed by the court, with authority to take charge of the lands and receive the rents, who entered upon the discharge of his duties as such, and collected the rents for several years thereafter. The personal representative was not a party to this suit, and no personal representative had ever taken possession or control of the land, or asserted the power to sell or rent, until the appellant, as administratrix,

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took control after the rents had been paid by the receiver to her solicitor by order of the Chancery Court. After the lost will was finally established and admitted to probate, Conoly abandoned all claims to the lands and the rents, and the rents in the hands of the receiver, after deducting certain costs and charges, were paid to the solicitor of appellant under an order of the court made in October, 1879, on her application as administratrix.

A receiver is appointed for the benefit and on behalf of the parties in interest during the pendency of the suit; and on its termination, for the benefit of the party ascertained to have the right to the property or fund in controversy. Whilst a stranger, whose rights are affected, may apply to be heard *pro interesse suo*, and his rights will be protected from diminution by reason of the receivership, it does not operate to enlarge such rights. "He can not claim and derive from it a benefit to which he would not have been entitled, if there had not been a receiver appointed."—*Scott v. Ware*, 65 Ala. 174. The interposition of the court by the appointment of a receiver does not change the ultimate rights of the parties. When Conoly abandoned his claim and further litigation, the possession of the receiver was by relation the possession of the heirs during the pendency of his appointment, and was exclusive of the possession or control of the personal representative. The money received by him for rents was in law and for all legal purposes, the money of the heirs, the same as if the receiver had been appointed, and they had continued in possession collecting the rents.

It is insisted, however, that the order of the Chancery Court directing the money to be paid to the appellant as administratrix, is *res adjudicata*, as to ownership, and that the appellant is estopped from denying, that the rents are assets of the estate. The petition was filed by appellant under and in pursuance of an agreement between the children, that appellant should obtain the money in the hands of the receiver, for the purpose of compromising the Craig claim and of paying the attorney's fees and costs, for which the children were liable. The application and proceedings thereon were *ex parte*. No issue was made or question raised or determined between the children and the administratrix as to the ownership. The children asserted their right and ownership to the rents in directing, by whom they should be received and the manner of their application; and the appellant, by receiving them under and in pursuance of such agreement, recognized and acted in subordination to the rights of the children. The appellant may be individually estopped from denying, that she received them in her representative capacity, for the specified purposes, and the children es-

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topped from denying the correctness of their application to the payment of the charges, which were fixed on them by their agreement and direction. Here the mutuality of the estoppel terminates, and the estoppel ceases. The application of the administratrix and the order of the chancellor, the children not having been made parties, would not, independent and exclusive of the previous agreement, estop the children from disputing her rights to the rents. It is manifestly unjust to charge the appellant with the amount of rents, and reject the vouchers evidencing its appropriation according to agreement.

Whilst we can not concur with appellant's counsel, that the order of the chancellor is *void*, we hold that it can not operate to convert the rents into *assets* of the estate, for which the personal representative is chargeable on her settlement, when in law and in fact they are not assets. A contrary ruling is inhibited by the statute, which declares, no executor or administrator is liable, except in a specified case not applicable here, beyond the amount of *assets* which have come to his hands, or which have been lost, destroyed, wasted, injured, depreciated, or not collected by want of diligence on his part, or by an abuse of his trust.—Code, § 2616. A decree against the personal representative, ascertaining the state of her accounts on settlement, is conclusive and binding on her sureties, as to all matters, not personal defenses; such as the *factum* of the bond.—*Martin v. Tally*, 72 Ala. 24. Receiving the rents, on such *ex parte* application, under such circumstances and for designated purposes, some of which are foreign to the due and legal administration of the estate, should not have any greater effect in estopping the administratrix from showing they are not legal assets, than if they had been received without an order of the court by her as administratrix, on a claim that they were assets. In *Smith's Heirs v. Smith's Adm'r*, 13 Ala. 329, it was said: "We assume it as a postulate, that if an administrator receives money or property belonging to the estate of his intestate, to which he is not entitled in his representative character, although he can not hold it against the party legally entitled, yet the Orphan's Court can not take it into the account, and render a decree against him therefor, on the settlement of the administration. A court of law, proceeding according to the ordinary forms, or a court of chancery, may hold him accountable and render complete justice." The effect of a decree against the appellant for rents, on her settlement, would be to fix not only on her individually, but also on her sureties, a charge, not authorized by law, which, in the absence of fraud or collusion, is conclusive on them. Of the agreement, and its performance or breach, the Probate Court had no jurisdiction; and although the administratrix charged herself with the money obtained from the

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receiver, if she was not so chargeable, it was competent for her to show the fact, and thereupon it was the duty of the court to make the correction.—*Smith's Heirs v. Smith's Adm'x, supra*. The court should have stricken from the account the charge for the money turned over by the receiver.

This conclusion renders unnecessary the consideration of the other questions presented in the argument of counsel.

Reversed and remanded.

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Petition for Certiorari.

1. *Judgment of Court of County Commissioners increasing valuation of property.*—The judgment of the Court of County Commissioners increasing the valuation of property as assessed for taxation, is a separate and distinct judgment as to each tax payer; and *certiorari* will not be awarded to bring up for review jointly, judgments involving different rights.

APPEAL from Etowah Circuit Court.

John H. Carter, with a number of others, united in a petition to the Hon. James Aiken, judge of the 9th judicial circuit, praying a writ of *certiorari*, directed to the Court of County Commissioners of Cullman county, in said judicial circuit, and returnable to the Circuit Court of said county of Cullman, praying that the proceedings of the Court of County Commissioners, in reference to matters in said petition specifically set forth, might be reviewed and corrected. The petition further prayed an injunction against the tax collector of said county, to restrain him from selling the property of petitioners for the payment of the taxes assessed upon the valuation as fixed by said Commissioners Court. The petition set out that petitioners had regularly returned their property for taxation to the assessor, at its correct valuation; but that the Court of County Commissioners, at their August term, 1885, had arbitrarily and illegally increased the valuation of the property returned by petitioners, setting forth specifically and at length the amount of such increased valuation in the case of each of the petitioners. The petition was presented to Judge Aiken, who made the following endorsement on the same: "After a careful consideration of the foregoing petition, it is ordered, adjudged and decreed that the prayer of the petition be, and is

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hereby refused on the following grounds, viz: 1st. That the petition shows that the Commissioners Court had jurisdiction of the subject-matter, and that the proceedings are regular on their face. 2d. It does not show that the petitioners have made application to the Commissioners Court to have the error complained of, in any way corrected. 3d. The petition shows no ground of relief."

From this action of the circuit judge, petitioners took an immediate appeal to this court, returnable to the first Tuesday in April, 1886, assigning as error, the refusal to grant said writ, together with assignments of error in regard to various irregularities in the Court of County Commissioners.

H. L. WATLINGTON, and WATTS & SON, for appellant.

GEO. H. PARKER, and HAMILL & LUSK, *contra*.

CLOPTON, J.—The judgment of the Court of County Commissioners, increasing the valuation of property as assessed for taxation, is a separate and distinct judgment as to each taxpayer, in which the other tax-payers have no individual interest. The petition is brought by fourteen different persons, and seeks, by one petition and one writ, to bring up for revision as many judgments. There is no community of interest between the petitioners, and no connection between the judgments. Different rights are involved, and the parties are different in each case. The appellate court has no authority to consolidate them, and render one judgement as to all. Two or more distinct orders of the Commissioners Court can not be taken to the Circuit Court by one writ of *certiorari*.—*Croswell & Monette v. Coms. Court*, 24 Ala. 282; *Davis v. Calhoun*, *Ib.* 437.

Affirmed.

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Bill in Equity for Partition.

1. *Bill for partition by tenant for life ; parties to*.—A tenant for life may maintain a bill in equity for the partition of lands, and it is the better practice to make all the persons having an interest, tenants for life and remaindermen, parties to the suit.

2. *Remainderman necessary party*.—If a remainderman is not made a party to the suit, his rights are not affected by any decree that may be rendered; and if an infant remainderman is made a party, but is not

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properly brought before the court, the decree will be reversed on error, no matter how the question is presented.

3. *Minors ; how brought before the court.*—When the complainant is the father of an infant defendant, whose mother is dead, service of process should be made on her general guardian, if she has any; and if process is served on the person who is averred to be her guardian, but the bill is not sworn to, and there is no affidavit of the fact that he is such guardian, and no proof of the fact, the infant is not properly before the court.

4. *Appearance ; record must show throughout.*—Where the defendants who have answered are actually present in court, either in person or by their solicitors or guardians *ad litem*, at the allowance of an amendment, they shall be deemed to have notice thereof; but the entries of record, made at the time, must show their presence, and when they do not, a recital in a subsequent decree *pro confesso*, taken before the register, is not sufficient.

5. *Tenants in common ; use and occupation.*—At common law, a tenant in common was not liable to his co-tenant for use and occupation, unless there was an actual eviction, or an agreement to pay rent; and the English statute (4th and 5th Anne) changing the rule, having been enacted after the settlement of this country, is not of force with us.

6. *Same ; account for rents received.*—For rents actually received one tenant in common is liable to account to his co-tenant; but, when the rents were received from a tenant to whom necessary advances to make a crop were supplied, such advances, and other necessary costs and expenses incurred, must be deducted from the gross amount received.

APPEAL from Selma City Court (equity side).

Heard before Hon. J. HARALSON.

BROOKS & ROY, for appellants.

SATTERFIELD & YOUNG, *contra*.

STONE, C. J.—Mary L. Gayle was the owner of a tract of land of some thirteen hundred and seventy acres, and died leaving a last will and testament, which was duly probated. She left five children—three daughters, Anna M., Rebecca D. and Lou. Reese, and two sons, Thomas G. and Billups J. Gayle—and by her will devised her real estate to them equally. She also left four lots in the town of Cahaba, devised, as the plantation was, to her children. The real estate thus became the property of the five children, held in equal, undivided interest as tenants in common, under the statutes of this State.—Code of 1876, §§ 2191, 2273. Lou. Reese died intestate, a minor and unmarried, and her brothers and sisters, four in number, became her heirs-at-law. Rebecca D. intermarried with William S. Johnston, and had issue, Fannie D. and Lula Reese Johnston, and died intestate, leaving her husband, the said William S. Johnston, and her said two children surviving her—the children being infants of very tender years. Her death occurred after the death of her sister, Lou Reese Gayle. Subse-

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quently Fannie D. Johnston died, an infant, not exceeding six years old, leaving Lula Reese Johnston her heir at law, and sole owner of her mother's interest in the real estate of which Mary L. Gayle died seized, in remainder after the termination of William S. Johnston's life estate in such undivided interest. Other persons own or claim interests in the shares of Anna M., Thomas G. and Billups J. Gayle in said real estate, under incumbrances alleged to have been created by them after their rights accrued under the will, but this record presents no question for our decision, arising out of such incumbrances or claims. We need not state them.

The present bill was filed by William S. Johnston, owner of a life estate in the undivided interest of his deceased wife, and prays to have partition of said lands, averring that they can be equally divided and partitioned by metes and bounds, without a sale. The bill makes the living co-tenants and the incumbrancers on their several interests parties defendant, and also makes the said Lula Reese Johnston a party defendant. There is in the record an affidavit made by complainant's solicitor, that Lula R. Johnston was an infant under fourteen years of age when the affidavit was made—two months after the bill was filed. A guardian *ad litem* was appointed for the infant defendant, he having consented in writing to act as such, and he put in the customary answer, denying the averments of the bill. Testimony was taken, and the case was submitted and tried on its merits. The chancellor decreed that complainant was entitled to partition; and from that decree the defendants appealed to this court. Only Anna M. Gayle, Thomas G. Gayle and Billups J. Gayle assign errors.

It is contended for appellants that William S. Johnston, being only tenant for life, can not maintain a bill for partition; and that Lula Reese Johnston, the infant, was not properly served with summons to bring her into court. We will consider these questions in connection with each other; for if partition had at the suit of the life tenant does not conclude nor affect the rights of the tenant in remainder, we can perceive no reason why other defendants should complain of irregularity in the service, nor indeed why such remainderman should be made a party. One appellant can not complain of error committed against another, unless the error affects the party complaining injuriously. Hence, if partition obtained at the instance of a tenant for life be binding and operative only during the life tenancy, there can be no reason for burdening the remainderman with the expense of such fruitless contention.

Some of the older authorities leave the impression that partition obtained at the suit of a life tenant, or tenant for a term of years, is, and can be binding only during the continuance of

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the term, or particular estate; and that when the particular estate falls in, there will be a relapse to the *status* of occupancy in common, unless other proceedings in partition be had. There can be no question that the remainderman will stand unaffected by the decree, if he is not made a party, and brought properly before the court that his interests may be fairly and fully represented.—*Warner v. Baynes*, Ambler 589; *Wills v. Slade*, 6 Ves. 498; *Baring v. Nash*, 1 Ves. & B. 550; *Wooten v. Copeland*, 7 John. Ch. 140; 1 Sto. Eq. Ju. § 656.

The better rule permits all the interests to be brought before the court and represented, so that the decree pronounced shall bind all interests, and conclude the claims of remaindermen as well as those of the termors, or life tenants. “If a complete partition be desired, all parties interested may be brought before the court, and all estates, whether in possession or expectancy, including those of infants and all persons not *in esse*, may be bound by the decree.”—*Adams Eq.*, *230; *Lord Brook v. Lord Hertford*, 2 Peere Wms. 518; *Gaskell v. Gaskell*, 6 Sim. 643; *Striker v. Mott*, 2 Paige 387; *Woodworth v. Campbell*, 5 Paige 518; *Freeman on Co. & Part.* §§ 439 to 441; *Young v. Rathborn*, 1 C. E. Green. 224; *Maxwell v. Gretsam*, 11 Vr. 383; *Bromberger v. Clippenger*, 5 Watts & S. 311. The latter rule is so much more promotive of the interest of the parties; contributes so much more effectively to the improvement and preservation of the estate, that it should always be pursued when practicable. The present bill makes the remainderman a party, and therefore proves its purpose is to obtain complete, as distinguished from temporary partition.

We will be pardoned for saying that in a case like this, which deeply concerns the interests of an infant of tender years, the chancellor cannot well be too watchful of the rights of such infant. If there be any room for doubt or uncertainty, whether the lands allotted to him are of fairly equal value with the other shares, the reported partition should not be confirmed, without reference to the register, and satisfactory report thereon.

The present bill being framed for complete partition, no decree pronounced against the infant, Lula Reese Johnston, will be regular, unless she was served with summons in the manner the statute and rule of practice direct—*Clark v. Gilmer*, 28 Ala. 265. And if the service in this case was not made according to rule, it is our duty to reverse the decree, no matter how that question is brought before us. Circumstanced as this infant was, her interest being in law adverse to that of her father, and she having no mother, her general guardian, if she had one, was the proper person to receive service for her.—Rule 23 of Chancery Practice. The bill avers that Harry Toulmin is the guardian of Lula Reese Johnston, and summons for her

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was served on him. He was not made a party as guardian. The bill was not sworn to, and no affidavit was filed, affirming that he had been appointed, or was her guardian. This averment of the bill was denied by the defendants who answered, and the record contains no proof that he was such guardian. The record fails to show the service on her was regular, and for this error the decree of the chancellor must be reversed.—*McIntosh v. Atkinson*, 63 Ala. 241; *Cook v. Rogers*, 64 Ala. 406. We will add, if the bill had been sworn to, or if an affidavit had been filed with it, affirming that Toulmin was her general, or regularly appointed guardian, this would have been sufficient, in the absence of a plea, or express denial in the answer that he was such guardian. We will add further, that when suit is by, or against a person in his representative capacity—as administrator or guardian for instance—such representative relation need not be proved, unless directly put in issue.

A second error insisted on, is the asserted failure of the record to show that notice of the amendment to the bill was served on the defendants who had previously answered the original bill; and that decree *pro confesso* was taken against them without such previous service. Rule of practice No. 47, provides, that “where the defendants who have answered are actually present in court, either in person or by their solicitors or guardians *ad litem*, at the allowance of the amendment, they shall be deemed to have notice thereof.” The amendment in this case was by interlineation in ink of a different color, and was allowed in term time, February 17, 1885. The entries on the record made at that time, fail to show the defendants were actually present in court in person, or by their solicitors. The guardian *ad litem* for the infant answered, and the other defendants failed to answer the amendment. On the 25th May, 1885, a decree *pro confesso* was entered up by the register against the defendants, who had answered the original bill, but had failed to answer the amendment. In this decretal order, the register recites that the said defendants, Anna M., Thomas G. and Billups J. Gayle, “were present in open court, and had notice of the allowance of such amendment.” The evidence on which this recital was based is not shown by the record. As we have said, the order by which the amendment was allowed makes no mention of the actual presence of the defendants, either by themselves or counsel. The register could not rightfully consult his personal recollection of what had occurred, nor should he have received extrinsic evidence of the fact. *McDougald v. Dougherty*, 39 Ala. 409, 431. There was no legal evidence that the three defendants named—the only adult defendants who had answered—were actually present in

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court when the amendment was allowed; and the decree *pro confesso* was improperly granted. This question, however, should have been raised before the chancellor, and can not be raised here for the first time.

The bill in this case seeks also to have Anna M. Gayle and Billups J. Gayle held to account for rents of the property, alleged to have been received and appropriated by them during the years 1883 and 1884. No recovery is sought for the mere use and occupation. Under our rulings such could not be had, unless the co-tenant complaining had been actually evicted, forcibly kept out of possession, or there had been an agreement to pay rent.—*Newbold v. Smart*, 67 Ala. 326; *Terrell v. Cunningham*, 70 Ala. 100; *Wilkinson v. Stuart*, 74 Ala. 198; *McMath v. DeBardelaben*, 75 Ala. 68; *Sargent v. Parsons*, 12 Mass. 149. Such is the rule of the common law. In England the statute of 4 and 5 Anne was so interpreted as to give a right of recovery for mere use and occupation by one part owner against another; and similar statutes have been enacted in some of the States, with a like interpretation. We have no such statute; and the statute of Anne being enacted after the settlement of this country, we are left under the common law rule, which denies such recovery.

The precise form of the claim in this case is, that for the year 1883, Anna M. Gayle let the premises to rent at an agreed money rental of two hundred dollars, in addition to repairs to be made, and that she has collected and withholds the rent. We think it clear, complainant is entitled to relief as to this sum, and that the chancellor did not err in so decreeing. The bill also claims account and relief as to rentals alleged to have been realized in and for the year 1884 by Anna M. and Billups J. Gayle.

As to the year 1884 the facts are substantially as follows: The cultivable land on the plantation was about six hundred acres, of which Billups J. Gayle and Anna M. took control of four hundred and twenty-five acres in unequal parts, and let the most of it to rent. One hundred and seventy-five acres of the cultivable land were left uncultivated and undisturbed. Billups J. testifies that this 175 acres was so left that William S. Johnston might cultivate or dispose of it at his pleasure; but it is not shown that he was notified it was so left for his use. He did not occupy it, and gave it no attention. It lay fallow during the year. The 425 acres were chiefly let in small lots to several freedmen, who were unable to secure the rent, or to furnish team and supplies to cultivate a crop; and the testimony shows that without such assistance rendered to them, they could not have been obtained as tenants. The real transaction was, that Anna M. and Billups J., as part of the contract

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of letting, undertook to furnish the tenants with teams and provisions; and that to enable them to do so, they pledged the rent notes or contracts, and mortgaged their interest in the lands to a commission merchant, to raise the means with which to supply the tenants. The testimony tends strongly to show that tenants on the lands could not have been obtained on any terms less onerous. We need not decide this, however, for the inquiry is not, what rents could have been realized with present management. They owed no duty to the complainant in that regard. It was his duty to look after his own interest; and he had no greater right to demand or expect their care and diligence in making the common property productive, than they had to require the same service of him. All he can require of them is, that of the rents actually received by them, they shall share with him to the extent of his interest. Now, if furnishing supplies was one of the conditions of the letting, and supplies were accordingly furnished, without which there would have been no cultivation, no crop, and no rent paid, are not the supplies a part of the expense of the cultivation, of the crop, and of the rent-bearing fund? And can it be said that rent has been realized, until all these necessary, preliminary expenditures are reimbursed? and will the co-tenant be allowed to ratify, claim and enjoy his share of the nominal product of the letting, without bearing his proportion of the expense which produced it?

In *Ruffners v. Lewis*, 7 Leigh 720, one of the questions arose on a partition of lands, and a settlement of the account for profits realized from the common property. The lands lay in the Kanawha section, and were what are there known as salt lands. One of the common owners had experimented, and, as was necessary, had sunk wells as a means of reaching the salt-bearing water, and had incurred other expenses. Some of their experiments were failures, entailing loss. Others were successful, yielding a profit. It was sought to charge him with the profits, and leave him to bear the losses. In that State—[Virginia]—there is a statute modifying the common law rule, and partaking of the nature of the statute of 4 and 5 Anne. The court, President TUCKER, said: "I am clearly of opinion that the defendants were not only fairly entitled to a credit for their expenses and actual services in the successful operation which terminated in rendering the property of great value, but also for their expenses, labor and services in their unsuccessful experiments. The plaintiffs, if they will have advantage from their successes, must be content to share in their disappointments and failures. He who takes the profits must share the burden." CARR, J., said: "The Ruffners must be treated as tenants in common with Prior; not as trespassers. They are liable for a fair share of the profits, and entitled to full

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compensation for their expenses fairly and reasonably incurred, as well as those attending their abortive efforts to find water, as their more fortunate ones."—*Irvine v. Hanlin*, 1 Serg. & R. 219; *Freeman C. & P.*, § 271; *Early v. Friend*, 16 Gratt. 21; *Sargent v. Parsons*, 12 Mass. 149.

The appellants, Anna M. and Billups J. Gayle, are liable to the complainant for his share—not of the gross rents they apparently received, but for the net sum realized, after deducting the expenses and losses incurred in having the crops grown and brought to market.

Reversed and remanded.

McMillan et als. v. Rushing et als.

Bill in Equity by Devises against Administrator de bonis non. for Recovery of Land sold by him, and for an Account.

1. *Decree of insolvency; when not conclusive on heirs and distributees.* A decree of the Probate Court declaring an estate insolvent, and subsequent proceedings based on that decree, rendered and had prior to the enactment of the statute approved December 4, 1878 (Sess. Acts. 1878-9, p. 69), are not conclusive on the heirs and distributees, legatees and devisees, who were not parties, and had no right to file objections to claims, nor to contest the administrator's accounts.

2. *Account; bill for, by legatees and devisees against administrator of estate declared and settled as insolvent; what necessary to be shown.*—To sustain a bill by legatees and devisees, against the administrator of an estate which has been declared and settled as insolvent, for an account of property specially devised and bequeathed to them, they must show that, on a proper accounting, after paying all the debts properly filed against the insolvent estate, assets will remain to which they are entitled.

3. *Administrator without interest cannot purchase at his own sale.* When an administrator has no interest in the estate which he represents, he cannot become, either by himself, or jointly with another person, the purchaser of lands sold by himself under a probate decree, but such sale is voidable at the election of the heirs or devisees seasonably expressed; and the confirmation of the sale by the Probate Court does not prevent the application of the equitable doctrine.

4. *Laches not imputed to infant; when election seasonably expressed.* As a general rule, laches will not be imputed to an infant; and where several children, seeking to set aside a purchase of lands by an administrator at his own sale, file their bill within two years after the eldest had attained his majority, their election is seasonably expressed.

5. *Who not purchasers for valuable consideration.*—Neither a voluntary donee, nor a grantee by quit claim only, is entitled to protection as a purchaser for valuable consideration; and a purchaser at a sale made by an administrator stands in no better condition.

6. *When not necessary to set aside order of sale.*—In setting aside a

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sale under a probate decree, where the administrator himself became the purchaser, it is not necessary or proper to set aside the order of sale, if regular; but the court may, if necessary, direct a new sale under it.

APPEAL from the Chancery Court of Sumpter.

Heard before the Hon. THOMAS COBBS.

The facts sufficiently appear in the opinion of the Court.

COOKE & LITTLE, for appellants.

GEO. G. LYON, A. G. SMITH, and W. L. BRAGG, *contra*.

CLOPTON, J.—The subject-matter of the suit is an account of the personal property which came to the possession of McPherson as administrator *de bonis non* with the will annexed of the estate of M. B. Taylor, and a recovery of the lands sold by him as such administrator, under a decree of the Probate Court; which personal and real property was bequeathed and devised to the children of D. M. Taylor, who were living at the time the will was made, and at the time it went into effect. The testator died in 1861, and D. M. Taylor was appointed and qualified as executor of his will, and acted as such until his death, in May, 1867. In July thereafter, McPherson was appointed administrator *de bonis non*. On his report, the estate was declared insolvent, in November, 1868; and succeeding the decree of insolvency, a final settlement of his past administration was made in March, 1869. The creditors not having nominated any person, he was continued administrator of the insolvent estate; of which final settlement and distribution was made in March, 1870.

The proceedings in insolvency were instituted and conducted under the statutes constituting sections 2549 to 2589, inclusive, of the Code. Prior to the act of December 4, 1878 (Acts 1878-79, p. 69), the heirs, distributees, legatees, and devisees were not parties to such proceedings, and had no right to file objections to claims, nor to contest the account of the administrator. The decree of insolvency, under the statutes, was made on the report of the personal representative, without further proof, if no creditor contested; and was intended to declare the *status*, or condition of the estate, as between the personal representative and the creditors, who were the only parties from the commencement of the proceedings to the final distribution to the creditors. These are the only persons to whom notice was required, who were barred by the proceedings, or as against whom they were evidence that the estate was insolvent.—*McGuire v. Shelby*, 20 Ala. 456; *State Bank*

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v. Ellis, 30 Ala. 478. At the time of the institution of the proceedings in insolvency, there was no personal representative of the estate of D. M. Taylor, and an administrator subsequently appointed is not affected or concluded thereby. The settlements and decrees on the insolvent estate are, as to the complainants, *res inter alios acta*. If, by the maladministration of the personal representative, their special rights and interests have been impaired, or brought to nought, a court of equity, on a proper case made, has jurisdiction to compel an accounting, and a settlement of the administration of the property, real and personal, specifically bequeathed and devised to them, and to those whom they represent. The controlling purpose of the bill is not a settlement of the administration of the entire estate, though it may involve such settlement. The direct object is to recover specific real property, and damages specially caused to the complainants by the alleged wrongful and fraudulent conduct of the administrator. Of course, to sustain such bill, it must be shown that, on the proper accounting being had, there will remain, after paying the debts of the estate legally and equitably due, assets to which the complainants are entitled.

In November, 1867, McPherson, as the personal representative, made application to the Probate Court for an order to sell the lands, on the ground that the personal property was insufficient to pay the debts of the estate. In January, 1868, the court granted an order to sell the lands, for cash; under which they were sold by the administrator, in May, 1869, and were bid off by Hugh McMillan, at the sum of \$8,342.80. On June 14, 1869, the sale was confirmed by the Probate Court, and an order made for a conveyance to the purchaser. On the succeeding day, McPherson, as administrator, executed a conveyance to McMillan; and on the same day, McMillan conveyed an undivided moiety of the lands to Mrs. McPherson, the widow of the administrator. The latter deed recites generally, "*for divers good and sufficient considerations by me received*;" but no consideration in fact moved from Mrs. McPherson, or her husband, to McMillan, and there is no pretence, that she ever paid to the administrator any part of the purchase-money. In her testimony, she says the purchase was made to save the lands for McMillan and herself; and without expressing it in terms, intimates that the consideration was an indebtedness on account of her separate estate. In 1868, Colgin conveyed to Mrs. McPherson a house and lot, which McPherson had purchased from him at the price of about \$3,000. As Colgin testifies, the deed was made to Mrs. McPherson, at the request of her husband, because, as he stated, he had converted her separate estate, and desired to invest in the house and lot for her

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benefit. The separate estate consisted of several slaves, and of money less than a thousand dollars. The slaves were emancipated, and for them and their hire the husband was not responsible; and the house and lot was a manifold payment of the money estate. The conclusion is irresistible, that the lands were really purchased by McMillan in his name for the benefit of himself and McPherson; and that the conveyance to Mrs. McPherson was voluntary—a gift by the husband to the wife. The purchase-money, except a small amount, was paid with claims against the estate purchased by the administrator and McMillan.

Thus the bill and the facts make the case of a sale of the lands of an estate, by an administrator, in the purchase of which he is interested. A purchase of lands at his own sale by an administrator, having no interest in the property sold, is voidable at the option of the heirs, or devisees, expressed in due time.—*Daniel v. Stough*, 73 Ala. 379; *James v. James*, 55 Ala. 525; *Calloway v. Gilmer*, 36 Ala. 354. A purchase by a third person in his own name, for the joint benefit of himself and the administrator, does not exempt it from the operation of the rule. As a general rule, no officer or person charged with the sale of property, whether by an order of court, or power from the owner, will be permitted to become the purchaser. Assuming a fiduciary relation to another, it is the duty of the trustee to exercise all the knowledge and advantages which he acquires by reason of his position, for the benefit of his *cestui que trust*. As vendor, his duty is to sell the property for the highest price; as purchaser, his interest is to buy it for the lowest. A court of equity will not suffer relations, so essentially repugnant, to be united in the same person. The only exception to the rule, in respect to an executor or an administrator, admitted by our decisions, is when the personal representative has an interest in the property sold; and regrets, on account of this exception, have been expressed. A purchase at a sale of land made by an administrator, though under a decree of the Probate Court, in which he is interested, directly or indirectly, entirely or partially, will be set aside, on the seasonable application of those interested. The purchase is equally voidable as to any one who may unite with the administrator; for, having joined with him in the commission of an act violative of his duty, and against the policy of the law, he must share the consequence.—*Hunt v. Bass*, 2 Dev. Eq. 292; *Armstrong v. Campbell*, 3 Yer. 201; 1 Lead. Cas. in Eq. 246.

The report of the sale to the Probate Court states: "*The said Hugh McMillan has arranged the payment of said sum of \$8,342.80 with him, the said administrator, so that he, the*

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said administrator, reports the same as in fact paid, and chargeable to said administrator." The report of payment is cautiously worded, and may be true, and yet none of the purchase-money actually paid. Without further proof of payment, the court should not have confirmed the sale. By the statute then in force, the court must make an order confirming the sale, whenever satisfied that it was fairly conducted, that the land sold for an amount not greatly less than its real value, and the purchase-money is sufficiently secured.—Code of 1876, § 2467. Such decree of confirmation does not defeat the application of the equitable doctrine. The question of the fairness of the sale, or of a full price, or of the payment of the purchase-money, is immaterial. The rule is not intended merely to redress an injury committed; but, by removing temptation, to prevent fraud and injury. The parties interested have a clear right to avoid the sale, when it falls within the general principle, irrespective of the facts of the particular transaction.—*Foxworth v. White*, 72 Ala. 224.

The infancy of the devisees, who filed the bill, exempts them, both from the operation of the statute of limitations, and from the imputation of *laches*, or unreasonable acquiescence, such as will render their claim stale in the contemplation of a court of equity. The general rule is, though subject to some exceptions, that *laches* will not be imputed to an infant during minority, as he is not, in legal contemplation, cognizant of his rights, or capable of enforcing them. If infancy intervenes, the staleness of the transaction does not work prejudice. The complainants had no guardian. They resided with the family of the administrator and his relatives. The bill was filed within less than two years after the eldest attained her majority. The option to avoid the sale was seasonably expressed.

The defendants, who claim title to the lands, are not in a position to invoke the protection accorded to *bona fide* purchasers without notice of outstanding equities. An essential element to the relation is, that the party shall not be a mere donee. He must have parted with value, or changed his condition to his detriment, believing that his vendor is capable to convey a fee-simple estate. Mrs. McPherson, as we have said, neither gave nor released anything of value, as a consideration for the conveyance to her, nor did she alter her condition for the worse. She acquired her title by a mere donation of her husband. Whatever right Mrs. McMillan has was derived by the purchase of her deceased husband's interest, at her own sale as administratrix of his estate, under a decree of the Probate Court. On such sale, there is no warranty; the buyer purchases at his peril, acquiring only the estate or interest.

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which the decedent had. The conveyance, ordered by the court, only conveys "all right, title, and interest, which the deceased had in such lands at the time of his death." Mrs. McMillan occupies no better position than a vendee, who agrees to take the title of his vendor, without stipulation or covenant that it shall be good. The sub-purchaser, Jacob Taylor, claims solely by quit-claim deed. The uniform rule is, that a purchaser, taking merely a quit-claim conveyance, which passes only such title as the grantor has, is not a *bona fide* purchaser entitled to protection against equities.—*Smith v. Parry*, 56 Ala. 266. A recovery of rents follows as an incident the recovery of the lands.

We do not deem it necessary to consider, in the present state of the case, the other questions of fact, as we reach the same conclusions as the chancellor in respect to the substantial matters involved in the decree, though on different principles. The questions relating to the alleged wrongful and fraudulent conduct of McPherson, and his conspiracy with McMillan to defraud the complainants, will more properly arise on the reference to the register, when he will ascertain with what sums of money or assets McPherson is chargeable as administrator, what disposition he has made of them, and what amounts he is entitled to be reimbursed, as having been expended in payment of debts justly due by the estate. Other and additional testimony may be introduced as to these matters, and we forbear to express an opinion on them at the present time.

The petition for the sale of the lands was sufficient to give the court jurisdiction; and the proceedings and order of sale appear to be regular. The chancellor should not have annulled and set aside the order of sale. The court can direct a sale under the order, without further proceedings and proof, if a sale becomes necessary; and a sale under it can not be made without the leave and direction of the court. No injury can result from the order being suffered to remain in force.

The decree will be amended, in accordance with this opinion, and, as amended, is affirmed.

Long v. Gill.

Bill in Equity Praying for Injunction, and Abatement of Obstruction of Right of Way.

1. *Right of way.*—The conveyance of a right of way over a parcel of land, not defining its limits, but simply designating the place, where it may be reasonably enjoyed, does not operate to pass a right to the unobstructed use of the entire lot described.

2. *Burden of proof.*—When an affirmative fact is averred, on which the title to relief is founded, and is denied, the burden of proof rests on the complainant, and it is incumbent on him to produce a sufficiency of evidence to satisfy the mind.

APPEAL from the City Court of Selma.

Heard before Hon. JON. HARALSON.

The bill in this case was filed in the City Court of Selma, sitting in equity, by Herman Long, against William B. Gill, and prayed an injunction against the continuance of an alleged obstruction by said Gill, of a certain right of way belonging to complainant, and sought the removal of said obstruction, a small brick building, erected by defendant in said right of way. The bill averred that on the 6th of January, 1871, complainant purchased from Geo. L. Watson and Winslow P. Becker, a certain lot and store-house in the city of Selma, fronting on Broad street, and running back in a northerly direction to an open rectangular area of about thirty by twenty-eight feet. This rectangular area was owned by the defendant, and from it an alley-way ten feet wide ran out to another alley leading out to the street. The bill avers that complainant had purchased from the grantors of defendant the right of way over said parcel of land, viz; said area and alley-way, and the unobstructed use thereof was necessary to the ingress and egress to and from the rear of complainant's said lot, with drays, wagons and other conveyances employed in carrying on his mercantile business; that defendant had purchased said parcel of land with actual knowledge of complainant's right of way, and had erected thereon a brick building which materially abridged and restricted the right of plaintiff to the use of the same. The bill prayed that an injunction issue prohibiting defendant from the further use of said erection; and that on final hearing, a decree be rendered directing its removal, and that said Gill, his agents, heirs and assigns, be forever prohibited from again obstructing said right of way. An an-

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swer was filed by defendant, denying that said right of way was obstructed, or its convenience to complainant materially affected, by the erection of the small brick building, and denied the right of complainant, under the terms of his purchase, to the unobstructed use of the whole space over which he acquired a right of way. On final hearing on the pleadings and evidence, the chancellor dismissed the bill, and his decree is now assigned as error.

BROOKS and WHITE, for appellant.

W. R. NELSON, *contra*.

CLOPTON, J.—The claim of complainant depends on grant; and by its construction the nature and extent of the easement have to be inferred. The deed, under which he derives title, conveys “*the right of way over the following lot or parcel of land, to-wit:*” following which is a description, by metes and distances, of an open space of land, immediately in rear of the store, then owned and occupied as a clothing store by the grantees, and now owned by the complainant. The description was not intended to define the limits of the right of way, but to designate the place, where it was to be reasonably enjoyed. The terms of the grant, considered in reference to the locality and situation of the premises, do not operate to pass a right to the unobstructed use of the entire lot described—such as a right of way over a street, or a strip of land appropriated to the purposes of a street—but to the convenient use of so much as may be necessary to the purposes intended by the grant. In *Johnson v. Kinnicutt*, 2 Cush. 153, the defendants being the owners of a block of stores and some land immediately back of and adjoining them, conveyed to the plaintiff a part of the latter—leaving a space of twenty feet between the stores and the land conveyed—“together with the right of passing and repassing over the space of twenty feet between the west wall of the store aforesaid, and the eastern line of the before granted premises.” The plaintiff claimed, that he was entitled to an unobstructed use of the whole space. It is said: that the words in the grant “describe the close in, through, and over which, the plaintiff should have a right of way; but they do not describe the limits of the way granted. It was therefore the grant of a convenient way, within those limits, adapted to the convenient use and enjoyment of the land granted, for any useful and proper purpose, for which the land might be used, considering its relative position” to the streets and other parts of the town, and other like circumstances.

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When no dimensions, nor purposes, are expressed, the extent and nature of the right of way may be inferred from the terms of the grant, interpreted in the light of surrounding facts and circumstances. The parties are presumed to have contemplated the necessities, conveniences, and usages, incidental to a way in such locality, and the grant is to be construed in reference to the position and situation of the place where the way is granted; the intention of the parties being the object of inquiry. The local position, the relative situation of the store of the grantees in reference to the land over which the way is granted, and to the adjoining street and alley, and the purposes for which the store had been previously and was then used, are all elements of consideration. The store of the grantees was bounded on Broad street in the city of Selma, and constituted one of a block of stores, without access to the back part thereof from outside. The only place to receive and deliver goods was in front on Broad street. The grant conveyed the right of way over an alley ten feet wide, leading from without into an open space of about thirty by twenty-nine feet, and over such space, adjoining the back wall of the store. From the circumstances and the situation of the premises, evidently the intention was to provide a mode of ingress and egress for the purpose of receiving and delivering goods and other articles of use at the rear end of the store. The easement extends to the convenient use of the land for vehicles or conveyances, such as may be reasonably required. The complainant therefore is entitled to a way reasonably convenient for the employment of conveyances, such as are usually and generally employed in transporting goods to and from stores. But the owner of the soil is entitled to all the rights, benefits, and privileges of ownership, consistent with and subject to such easement.—*Atkins v. Bondman*, 2 Met. 457; *Brakeman v. Talbot*, 31 N. Y. 366; Wash. Eas. & Serv. 264.

The obstruction complained of is a small brick building, erected by the defendant in a corner of the lot. No complaint is made on any ground, other than as an obstruction. The defendant had the right to erect the building on the land, though a smaller space is left, provided unobstructed space remains reasonably convenient for vehicles to enter, load, and unload, turn, and go out by the alley through which they enter. It is not a necessary consequence, that the complainant is denied the reasonable and convenient use of a way, because a part of the land is occupied by the building. As the City Court adjudged the rights of complainant in unison with these views, the case is reduced to a question of fact—whether the obstruction abridges or impedes the reasonable and convenient use of the right of way for the purposes intended, and for which it was

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granted? The answer denied the alleged obstruction of the use of the way. When an affirmative fact is averred, on which the title to relief is founded, and is denied, the burden of proof rests on the complainant, and it is incumbent on him to produce a sufficiency of evidence to satisfy the mind. If the existence of the fact is in uncertainty or equipoise, the complainant fails for the want of proof.—*Hawes v. Brown*, 75 Ala. 385.

While we will not undertake the useless task of reviewing the evidence, *pro* and *con*, we can not, in considering it, ignore the fact, testified to by the defendant, and uncontradicted, that in 1875 he erected a wooden structure of about the same size, and at the same locality, which was used for the same purposes, as the present erection; which remained without objection or complaint until the brick building was erected; and also, while the complainant testifies that he protested against the new building, on his return from the North, soon after its completion, which the defendant denies, it does not appear that any further complaint was made for two years or longer, until shortly before the filing of the bill. Acquiescence for an unreasonable time, when a party has full knowledge of his rights, of an invasion by the wrongful acts of another, and the injurious consequences, though not equivalent to an estoppel, or to a bar of the right of action at law, may operate to preclude a resort to remedies peculiarly and exclusively equitable. Ordinarily, seasonable application is requisite to call into exercise the extraordinary jurisdiction and restraining powers of the court.—*Western U. Tel. Co. v. Judkins*, 75 Ala. 428; 2 Pom. Eq. Jur. § 817. We do not mean to say, that the acquiescence of complainant has been sufficient to preclude his application to remove and restrain the impediment; but it is a material and important circumstance to be considered in weighing conflicting evidence.

The City Court, as stated in the opinion of the presiding judge, was met by evidence "in painful and irreconcilable conflict," and guided by the rule, that it is incumbent on complainant to establish his case, found that he had failed for want of proof. Though in our individual opinion, the space left may seem narrow, and to some extent inconveniently restricted as to the turning of vehicles, and though we might think there is a preponderance of evidence in favor of complainant, if triers of the facts originally, when the dimensions of the unobstructed way are considered in connection with the other evidence; nevertheless, where there is a conflict, the witnesses being about equally balanced as to number and means of information, and acquiescence for several years in a similar obstruction, we can not judicially say, we are clearly convinced, that on the evidence, the finding of the court is erroneous.

Affirmed.

Harrison v. Jones.

Action on Account.

1. *Act adopting the Code; effect of subsequent act incorporated therein.* By the act adopting the Code of 1876, which was approved February 2d, 1877, it was provided, that "no act of the General Assembly passed at the present session shall be repealed or otherwise affected by" its adoption; and by force of this provision, an act passed subsequent to the adoption of the Code, and therein incorporated by the codifiers, repeals by implication any other provisions relating to the same subject with which it is in irreconcilable conflict.

2. *Who authorized to determine qualifications of persons desiring to practice medicine.*—Under the provisions of the act to regulate the practice of medicine in this State, approved February 9th, 1877, (Code, §§ 1528-35), the board of censors of the State Medical Association, and the board of censors of the several affiliated county associations, alone have authority to determine the qualifications required of persons desiring to practice medicine, and to grant certificates of qualification; and any person who engages in the practice of medicine, without having procured a certificate of qualification (§ 4244), is declared guilty of a misdemeanor.

3. *No recovery had for medical services unless there is a legal certificate of qualification.*—A penalty imposed by statute implies a prohibition; consequently, a recovery can not be had for medical services rendered by a person who has not procured a certificate of qualification from the proper medical authorities of the county in which he practices.

APPEAL from Butler Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

This was an action brought by Joseph Harrison against Joseph R. Jones for the recovery of an amount alleged to be due to the plaintiff for services rendered as a physician in attending the wife of the defendant; and was commenced on the 7th October, 1884, and the services were claimed to have been rendered during the months of April and May of that year. The defendant pleaded the general issue, payment, and the special plea, that the plaintiff was a practicing physician in the county of Butler, Ala., and that no certificate of qualification or diploma had been presented to the Probate Judge of said county for his endorsement and seal, and recorded in said probate office, as required by section 1532 of the Rev. Code of 1876; and, that the plaintiff had no such certificate as is required by said Code of 1876 from the county board, to entitle him to practice medicine in that county. To this special plea, the plaintiff demurred, on the ground, that said plea did not aver, that the plaintiff had not a license to practice as a

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physician, from one of the medical boards of this State, or, that he was not a graduate of some medical college in the United States. The court overruled this demurrer, and the plaintiff replied to the defendant's plea that he was a regular practicing physician in the State of Alabama, and was a regular graduate of the Medical College of the State of South Carolina, within the United States. To this replication the defendant demurred, and the court sustained the demurrer. On the trial evidence was offered by the plaintiff tending to prove the correctness of his claim, and plaintiff's diploma from the South Carolina college was put in evidence. Upon the evidence introduced, the plaintiff requested the court to give the following written charges: 1. "The court charges the jury that if they believe the evidence, the plaintiff would be entitled to recover, so far as the plea denying the right of plaintiff to recover on account of his not receiving the certificate of the board of censors affects his right." 2. "The court charges the jury that if they believe the evidence they will find for the plaintiff as to said special plea of the defendant." 3. "The court charges the jury that if they believe the evidence, the matters set up by defendant's special plea do not prevent a recovery by the plaintiff." 4. "The court charges the jury that, if they believe from the evidence that the plaintiff was a regular practicing physician, and had been such in the State since 1852, and that he had a diploma from the Medical College of the State of South Carolina, granted in 1852, and that this college was a reputable college, then this would be a sufficient authority to practice medicine so far as to authorize him to recover for services as such, rendered in 1884." The court refused to give each of these charges; and the plaintiff excepted to the several rulings of the court. Verdict was for defendant and the plaintiff takes this appeal.

GAMBLE & RICHARDSON, for appellant.

J. F. STALLINGS and TROY, TOMPKINS & LONDON, *contra*.

CLOPTON, J.—By the Code of 1852, the medical boards, then existing, were continued. They were required to examine all applicants for practice, and their diplomas or licenses, which, in all cases, were required to be from a respectable college, or institution, and if the applicants were qualified, and of good moral character, the board must grant a license to practice physic, surgery, and dental surgery, or any one or more of such branches. Every contract, the consideration of which was founded on services rendered as a physician, surgeon, or dentist was declared void, unless the person rendering such services had obtained a license to practice in such capacity from one of

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the medical boards of this State.—Code, 1852, §§ 971, 972, 973, 977. On February 17, 1854, an act was passed, allowing all regular graduates of any medical college in the United States to practice their profession without obtaining a license from the medical boards or societies as established by law; and by an act passed February 25, 1860, section 977 was amended, so as to exempt from its operation contracts, the consideration of which was formed on services rendered by a graduate of some medical college in the United States.—Acts 1853–4, 48; Acts 1859–60, 20. Sections 972 to 982 inclusive of Code 1852, with the subsequent amendments, constitute sections 1516 to 1527, inclusive, of Code 1876.

The Code of 1876 was adopted February 1, 1877; and by the act adopting it, it was provided, “but no act of the General Assembly, passed at the present session, shall be repealed or otherwise affected by the adoption of the Code.” On February 9, 1877, seven days after the adoption of the Code, and at the same session, “An act to regulate the practice of medicine in the State of Alabama,” was passed, the provisions of which are embodied in sections 1528 to 1535, inclusive, and sections 4244 of the Code 1876. Sections 1528 and 1529 prohibit any person to practice, either the regular or irregular systems, as a profession and means of livelihood, without having obtained a certificate of qualification from some authorized board of medical examiners, as provided by the statute. And section 1532 requires, that every diploma or certificate of qualification, issued by any authorized board of medical examiners, shall be presented to the judge of probate of the county in which the person to whom issued resides, who shall officially endorse the same, seal it with the seal of the county, and cause a full and fair copy to be made in a well bound book, to be kept for the purpose, and called the register of licensed practitioners of medicine.

It is insisted, that all the sections of the Code from 1516 to 1535 inclusive, being incorporated therein, must be construed in *pari materia*, as constituting one entire system; prescribing not only the mode of qualification, and the proof of the same, but also the keeping of a register of licensed practitioners of medicine, and regulating the validity of their contracts for services; and, that when thus construed, graduates of any medical college in the United States are still authorized to practice their profession, and recover for their services, without obtaining a certificate of qualification, and complying with the requirements of section 1532. A casual examination of the act of February 9, 1877, will suffice to show, that the purpose of the legislature was to organize a complete and entire system, regulating the practice of medicine in this State, and to supersede

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prior regulations. The board of censors of the Medical Association of the State, organized in 1873, and the boards of censors of the several county medical societies, in affiliation with the State Medical Association, constitute the authorized boards of medical examiners. The Medical Association of the State is vested with authority to determine, from time to time, the standard of qualifications required of persons desiring to practice medicine, and prescribe rules for the government of the authorized boards of medical examiners. And persons, who are authorized, and are engaged in the practice of medicine in this State, are entitled to a certificate of qualification from the board of medical examiners, and to be inscribed in the register of licensed practitioners, without examination as to qualification.—Code, §§ 1530, 1531, 1533. These provisions clearly show, that the design of the statute is to establish boards of medical examiners, other and different from those theretofore established; to have the standard of qualifications fixed by a State association organized under its laws; and to bring all physicians authorized and engaged in the practice of medicine, within the provisions of the statute, whenever a board of medical examiners is organized in the county of their residence.

The act of February 9, 1877, was not adopted with, and as a part of the Code. It was put in the Code in pursuance of the legislative direction, that the codifiers should incorporate in the Code all the acts of a public and general nature passed at that session. While it is true, that all laws embodied in the Code, as reported to the legislature were re-enacted by its adoption, yet an act passed at a later date of the same session will repeal by implication a section of the Code, when there is an irreconcilable conflict and repugnance. By section 1534, the provisions of the six preceding sections take effect in any county, whenever the board of medical examiners for the county shall have been organized, and such organization officially communicated to the judge of probate. While the previous statutes are in force in those, in which no such board of medical examiners has been organized, the provisions of the later statute are utterly inconsistent with the theory, that any medical college is authorized to determine and certify the qualifications required of persons desiring to practice medicine in the counties, where such authorized boards exist; and repeals, by clear implication, section 1522 of the Code as to such counties.

It being admitted, that there had been organized prior to, and was in existence during the period the services were rendered by the plaintiff, an authorized board of medical examiners in Butler county; and it appearing, that the plaintiff never obtained, but declined to accept, a certificate of qualification from such board, though one was prepared for him;

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and that no such certificate was presented to the judge of probate, the question is, can the plaintiff, notwithstanding, recover for the services rendered? Section 4244 makes any person, practicing medicine in this State in violation of any provisions of sections 1528 to 1535, inclusive, guilty of a misdemeanor. This section embodies section 6 of the original act. When the services were rendered, the plaintiff was practicing medicine, as a means of livelihood, in violation of the provisions of the act. Whatever may be the rule elsewhere, it is too well settled in this State to require further argument, that a penalty, imposed by statute, implies a prohibition; and a contract founded on its violation is void, though not so expressly declared by the statute. In *O'Donnell v. Sweeny*, 5 Ala. 468, it is said: "It would indeed be a strange anomaly, if a contract made in violation of a statute, and prohibited by a penalty, could be enforced in the courts of the same country whose laws are thus trampled on and set at defiance."—*Shippey v. Eastwood*, 9 Ala. 198; *Milton v. Haden*, 32 Ala. 30; *Woods v. Armstrong*, 54 Ala. 150; *Renfro v. Loyd*, 64 Ala. 94.

There is no error in the record.

Affirmed.

Wright v. Graves.

Action for Damages, for Breach of Lease Contract.

1. *Written conveyance not varied by parol reservation.*—A deed absolute in its terms, passes a fee simple estate *in presenti*, taking effect on delivery; and its legal effect can not be varied by a reservation in parol, so as to make the estate conveyed commence *in futuro*.

2. *Tenancy at will.*—A parol gift of lands, or an unexecuted parol contract of purchase accompanied with possession, creates a tenancy at will.

3. *A lease made with a tenant at will* constitutes the person making it, when let into possession, a sub-lessee who is precluded to deny the right or title of his lessor at the time of making the lease; but, if not let into possession, he may show that the contract of lease is invalid because unsupported by a sufficient legal consideration.

4. *Tenancy by sufferance.*—A tenant for life can not make a lease to continue longer than his own estate, unless the remainderman joins. If the lessee of the tenant for life is in possession at the time of his death, and continues to hold over, he becomes a tenant by sufferance; but, if the lessee is not in possession, or does not hold over, a mere recognition of a lease previously made does not constitute such tenancy.

APPEAL from Montgomery City Court.

Tried before Hon. T. M. ARRINGTON.

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This action was brought by Henry T. Graves against John D. Wright to recover damages for the breach of a lease contract entered into by and between the defendant and one W. D. Graves. The facts, as they appear by the bill of exceptions, are, substantially, that on 17th day March, 1883, W. D. Graves conveyed a tract of land, of which the land in controversy is a part, to Henry T. Graves, the plaintiff, absolutely in fee, reserving therein, by parol, a life estate for himself and his wife. On the 8th September following, W. D. Graves leased the premises to John D. Wright, the defendant, for the year 1884, who undertook to make certain improvements and repairs thereon. In December, 1883, Wright notified W. D. Graves that he would not take the place, and the evidence shows that he never entered upon the possession. W. D. Graves died in possession of the premises in August, 1884.

The contention of the plaintiff is that the covenants to repair, entered into by the defendant, run with the land, and that as reversioner he can maintain an action for their breach.

The defendant demurred to the complaint on the following grounds: 1. That it appears from the complaint that the obligations and agreements of this defendant set forth therein, were without consideration. 2. Because said complaint seeks to incorporate an alleged contemporaneous parol agreement upon a written instrument. 3. Because it appears from the complaint that said alleged contract was made and entered into with one W. D. Graves, and it is not shown that said contract was ever assigned to the plaintiff, or that he has any right to sue thereon. 4. Because it appears from the complaint that W. D. Graves had no power to execute a lease to the premises therein described, and hence there was no consideration for defendant's obligations and agreements. The court overruled the demurrers, and the defendant excepted. Upon the submission of the case to the jury, the plaintiff requested the affirmative charge: "If the jury believe the evidence they must find for the plaintiff," which was given by the court, and to the giving of which, the defendant excepted. The defendant asked the court to charge that, "if the jury believe the evidence they must find for the defendant," which charge the court refused to give, and the defendant excepted. Verdict was for the plaintiff, and the defendant takes this appeal, assigning for error the overruling of defendant's demurrers, the giving of the charge requested by the plaintiff, and the refusal to give the charge asked by the defendant.

STRINGFELLOW & LEGRAND, for appellant.—1. There was no consideration for the promises of the defendant. Those promises were given to W. D. Graves for the right to the

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possession of the premises named in the lease contract, for the year 1884, at a time when W. D. Graves had no interest in said land, except a tenancy at will, and no right to contract for the delivery of possession to the defendant.—*Collins v. Johnston*, 57 Ala. 307. 2. The plaintiff has shown no right to maintain this suit. The contract was made with W. D. Graves, not with the plaintiff; there is no privity shown between the parties; no assignment of the lease contract, either actually, or by operation of law. The defendant never went into possession of the premises. The plaintiff was not the assignee of a reversion to which rent is incident. The possible reversion, if any reversion at all, was destroyed by the death of W. D. Graves before the expiration of the term of the lease. 3. The parol reservation of the life estate, if valid, was for the life of W. D. Graves, and *his wife*; and the evidence shows that the wife still survives. The tenancy at will has never terminated. *Teidman on Realty*, § 213; 1 Wash. on Realty. There is a fatal variance between the complaint, which avers a life estate in W. D. Graves and the evidence which shows a life estate reserved to W. D. Graves and his wife. *Washington v. Timberlake*, 74 Ala. 262; *McMillan v. Otis*, 74 Ala. 560.

WILLIAMSON & HOLTZCLAW, *contra*, cited 14 M. & W. 682; 47 N. H. 320; 9 John. R., 267; 4 Kent. Com., 113; 1 Lid., 339; Taylor L. & Ten.

CLOPTON, J.—The deed, which was executed by W. D. Graves and wife in March, 1883, conveys to the plaintiff a fee simple estate to commence *in presenti*. The parol reservation of a life estate, whether prior to, or cotemporaneous with the execution of the absolute conveyance, was merged in it, and the deed took effect as an operative conveyance according to its terms from the time of its delivery. Its legal effect can not be varied or qualified by a reservation in parol, so as to make the estate conveyed commence *in futuro*. On the execution of the conveyance, the plaintiff was entitled to immediate possession, without condition or reservation.—*Williams v. Higgins*, 69 Ala. 517. Such are the effect and operation of the deed, and it is not competent to limit the words of grant, or postpone the enjoyment of the estate vested, by evidence resting in parol.

A parol gift of lands, or an unexecuted parol contract of purchase, creates a tenancy at will. *Collins v. Johnson*, 57 Ala. 304; *Jackson v. Rogers*, 2 John. Cas. 33; *Jones v. Jones*, 2 Rich. (S. C.) 542. Where the remainderman resided on lands, under a verbal agreement, that he and the life tenant should live together, and cultivate and carry on the farm, it

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was held, that the remainderman was a tenant at will.—*Leavitt v. Leavitt*, 47 N. H. 329. A tenancy at will may generally be regarded as created by implication of law, where a person, without a freehold interest or a definite term, enters into the possession of lands with the assent of the owner, and remains in possession by his permission and at his will, under circumstances, which do not create a tenancy by sufferance, or from year to year. The parol reservation of a life estate by W. D. Graves, being revocable, and subject to disaffirmance by the plaintiff, constituted him a tenant at will, so long as he continued in possession.

If the defendant had been let into possession, under the lease, by the tenant at will, he would have become a sub-lessee, and would have been precluded to deny the right or title of his lessor at the time of making the lease. But in *Crim v. Neems*, [present term], we held, if the tenant was not let into possession, he was not estopped from showing, that the contract of lease is invalid, because unsupported by a sufficient legal consideration. The contract of lease was made in September, 1883. In November or December, thereafter, the defendant declined to carry out the contract, and to take possession of the leased premises, which were a part of the lands conveyed by the deed to plaintiff; and was never let into possession. Ordinarily, a tenancy at will is not assignable, and making a lease terminates it. The owner may elect to treat the lease as a termination of the tenancy, or to permit the lessee to enter and remain in possession, thus constituting him a tenant at will; but it is a new tenancy, to the creation of which possession is requisite *Cook v. Cook*, 28 Ala. 660; *Reckhow v. Schanck*, 43 N. Y. 448. At the time of the making of the lease, the lessor, being himself a tenant at will, had no interest or estate in the lands, which he was capable of conveying, or out of which to create any estate or right in the defendant, available against the plaintiff. Had he entered into possession under it, he would have a disseizor, unless the plaintiff elected otherwise. "Rent being an equivalent for an interest enjoyed, a covenant for its payment can not be enforced, if no estate passed under the lease, and the tenant has not occupied the premises; since there is no legal consideration for the engagement."—Tay. L. & T., § 384.

But it is urged, that inasmuch as the lessor of the defendant was permitted by the plaintiff to receive the rents and profits of the lands during his life, and the parol reservation executed, the rights of the plaintiff should be considered the same, as if the reservation of a life estate had been valid in its origin. While it seems, that the liability of defendant should depend on the *status*, condition and rights of the parties at the time

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the agreement to lease was made, there having been neither a full nor part performance; if it were conceded, that the reservation must be regarded as valid from its inception, and as operative to carve out a life estate, the title of the plaintiff to a recovery on the covenant of lease would not follow. A tenant for life can not make a lease to continue longer than his own estate, unless the remainderman joins. If the lessee of the tenant for life is in possession at the time of his death, and continues to hold over, he becomes a tenant by sufferance. By acceptance of rent from him, or by other conduct, the remainderman may recognize him as a tenant from year to year; but if the lessee is not in possession, or does not hold over, a mere recognition of the validity of a lease previously made does not constitute a tenancy by sufferance or other tenancy.—Tay. L. & T., § 113. The defendant never having occupied the leased premises owed no fealty to the plaintiff. There is no evidence that the defendant ever acknowledged the title of the plaintiff, or held in subordination to it, or ever recognized the existence of the relation of landlord and tenant between them. There is no privity of contract, and the death of the tenant for life does not operate an assignment of the covenants of lease. His personal representatives may be entitled to recover the rent due by the contract up to the time of his death; but the right of the plaintiff as remainderman does not arise, or spring from the lease made by the tenant for life; but from a continued occupation by the lessee.—*Austin v. Thompson*, 45 N. Y. 114. Neither is the plaintiff authorized to maintain the suit as on covenants running with the land, since he is not assignee of the lessor, or if assignee, did not become so until the lease had been terminated by the death of the lessor.—*Andrews v. Pearce*, 1 N. R. 158; *Williams v. Burrell*, 1 C. B. 402. From the facts stated in the bill of exceptions, it can not be affirmed as matter of law, if a valid reservation of a life estate be conceded, that the defendant was tenant of the plaintiff, or that the plaintiff has a right to maintain an action in his own name on the covenants of lease.

Moreover, if it were conceded that there was a valid reservation of the life estate, and the right of the plaintiff to sue on the contract upon the termination of the life estate was also conceded, the reservation, as shown by the evidence, was for the grantor and his wife. The death of the wife is not shown, and hence it does not appear that the particular estate has fallen in.

The court erred in the ruling on the answer to the complaint, and in the charge given.

Reversed and remanded.

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Owings et al. v. Binford.

Action for Damages Against Sheriff and Sureties on Official Bond.

1. *Improperly sustaining demurrer to plea.*—The general rule is that injury results to the party against whom the error was made, when a demurrer is improperly sustained to a plea, and will operate a reversal; but, when it affirmatively appears that the party complaining has had, under the general issue or special pleas, all the benefits he could have had under the plea to which the demurrer was sustained, the error is not a cause of reversal.

2. *Service of summons on defendants.*—No valid judgment can be rendered against a party not before a court, and, on appeal, the record must reasonably show that the defendant was served or appeared. Where the record does not disclose the fact, inquiry must be addressed to the proper construction of the judgment entry.

3. *Construction of judgment recitals.*—The recitals of the judgment may be sufficient to bring in parties without service, and this construction will be placed upon them if necessary to preserve the verity of the record; but, if the recitals are consistent with the hypothesis that they did not appear, and the maintenance of the verity of the records does not require such construction, no intendment will be indulged in favor of the appearance.

4. *Case at bar.*—In the case at bar the name of each defendant is set out in the margin; the recitals are "*came the parties by attorneys;*" a judgment is rendered against all the defendants, *each being specially named in the judgment.* The necessary construction is that all appeared.

APPEAL from Pickens Circuit Court.

Tried before Hon. S. H. SPROTT.

This was an action brought by Daniel B. Binford, a minor, by his next friend, against W. P. Owings, sheriff of Pickens county, and J. M. Noland, J. H. Curry, Enoch Easterling, S. C. Nabers and H. B. Chappelle, sureties on his official bond, and sought the recovery of damages for the breach of the condition of said bond. The averments of the complaint are substantially that said sheriff, having in his hands a *Fi. Fa.* against Wm. H. Binford, the father of plaintiff, levied the same on the contents of a storehouse in Pickensville, in the possession of and belonging to the plaintiff, and against his protest; and after advertising the goods, sold them at public auction, by which wrongful conduct of said Owings the plaintiff was greatly damaged. The complaint further avers that the plaintiff is an emancipated minor. The record shows service of the summons and complaint upon W. P. Owings alone. The defendants filed five pleas to the complaint, the first and fifth

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denying the ownership of the property sold by the sheriff to have been in the plaintiff, and alleging that it belonged to the defendant in execution. The plaintiff demurred to these pleas, the court sustained the demurrer and the defendants excepted. The defendants then filed the plea of the general issue, and a number of special pleas, upon all of which issue was taken. The verdict was for the plaintiff, assessing his damages. The judgment of the court is that the plaintiff recover of said Owings, and each of his said sureties, naming them, the amount of damages assessed, together with costs. The defendants take this appeal and assign for error: 1. The action of the court in sustaining the demurrer to the pleas filed by defendant. 2. The sureties of Owings were never brought into court by being served with summons and complaint; nor were they legally before the court, that judgment could be rendered against them.

J. C. & W. F. JOHNSTON, and WATTS & SON, for appellants.

J. R. HINTON, J. B. and M. L. STANSEL, *contra*.

CLOPTON, J.—The appellant, Owings, separately assigns errors, relating exclusively to the ruling of the court in sustaining a demurrer to five special pleas, filed Feb. 2d, 1884. After the demurrer was sustained, Owings filed the plea of the general issue, and several special pleas, on each of which issue was taken, and on the issues thus taken the cause was tried. The only error, in this respect, insisted upon in the argument of counsel is, sustaining the demurrer to the fifth plea: and we may, therefore, consider the assignments of error, relating to the other pleas, as waived.—*Robertson v. Bradford*, 73. Ala. 116.

The complaint sets forth, that the plaintiff, who sues by his next friend, is an emancipated minor; that the goods in controversy are his property, and were seized by the sheriff under an execution against William H. Binford. The fifth plea avers, that the plaintiff is the minor son of William Binford, the defendant in execution, who is entitled to his earnings and services, and that the goods were not the property of the plaintiff, but of his father, and liable to seizure under execution. The plea is a denial of material allegations of the complaint and casts on the plaintiff the burden of establishing, in the first instance, a *prima facie* case,—his ownership of the property and his emancipation. The first of the series of the special pleas last filed, and the fifth plea, to which the demurrer was sustained, raise and present, substantially the same issues.

The general rule is, when a demurrer is improperly sustained to a plea, the presumption of injury arises, and will operate a

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reversal, unless it appears by the record, that injury did not result to the party against whom the error was committed; but when it affirmatively appears, that the defendant has had, under the general issue or special pleas, all the benefits he could have had under the special pleas, to which the demurrer was sustained, the error is not a cause of reversal. Although the record does not show what evidence was introduced on the trial, it affirmatively appears that, the case was tried on a special plea presenting as fully the same defense, though it may be in different phraseology. In such case, no injury can result, and the determination of the question, whether the demurrer is properly or improperly sustained, is unnecessary.—*Rake v. Pope*, 7 Ala. 303; *Goggin v. Smith*, 35 Ala. 683; *Michem & Smith v. Moore*, 73 Ala. 542.

The assignments of error by the other appellants relate to the rendition of a judgment against them; and it is insisted, that it is not shown by the record, that they were brought into court by the service of summons, or that they appeared. The rule is conceded, that no valid, binding judgment can be rendered against parties, who are not before the court, either by actual or constructive service, or by appearance; and on appeal, the affirmative fact must be reasonably shown by the record. The record does not disclose, that any summons was ever issued, or served on either of the defendants, other than an acknowledgment of service by Owings. The inquiry, therefore, must be addressed to the proper construction of the judgment-entry. This can scarcely be regarded an open question with us. In *Gilbert v. Lane*, 3 Por. 267, it was held that the names of all the defendants being on the margin of the entry, all the defendants, thus named in the margin, appeared in the suit. In *Wheeler v. Bullard*, 6 Por. 342, it was held, that, after a discontinuance as to a party not served, if at the next term, the case is stated against all the defendants, naming each of them, followed by appearance by attorney, and the withdrawal of pleas, the necessity for the service of process is obviated. And in *Moore v. Emanuel*, 8 Por. 442, it was held, that an entry at the trial, term—"came the parties by their attorneys"—is sufficient evidence of appearance to dispense with actual service of process. But when the process issues against several persons, some of whom are served and others not, and only those served plead, a recital in the judgment-entry, that the parties came by their attorneys, the names of all the defendants not being set out in the margin, will be construed as having reference only to those, who were served, and who made up the issue. Some stress was laid on the fact, that the recital was the *parties*, and not the *defendants*, came.—*Catlin, Peebles & Co. v. Gilder*, 3 Ala. 536; *Puckett v. Pope*, 3 Ala. 552.

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Without extending the review of the decisions, and without approving the generality of some of the expressions, it may be observed, that the principle deducible from them is: the recitals of the judgment may be sufficient to bring in parties without service; and this construction will be placed upon them, if necessary to preserve the verity of the record and not inconsistent with the inference that they did appear; but if the recitals are consistent with the hypothesis, that they did not appear, and the maintenance of the verity of the records does not require such construction, no intendment or presumption will, on error or appeal, be indulged in favor of the appearance. *Hunt v. Ellison*, 32 Ala. 173, 207.

In the present record the name of each defendant is set out in the margin. The recitals are, "*came the parties by attorneys; plaintiff demurs to plea of defendants; the demurrer is sustained; the motion to dismiss is overruled, and plaintiff takes issue on pleas Nos. 1, 2, 3, 4, 5, 6 and 7, and the general issue, being joined, came a jury;*" and after reciting that the jury returned a verdict for the plaintiff and assessed the damages, a judgment is rendered against all the defendants, *each being specially named in the judgment*. The recitals, followed by the judgment rendered, are inconsistent with the supposition, that any of the defendants, named in the margin, did not appear; and it is manifest, the verity of the record requires a contrary construction. Otherwise, the record does not speak the truth, and the court has usurped jurisdiction, by submitting to the jury the rights of persons, who were not parties to the issue, and rendering judgment against them. The entry leaves no room for construction, as to the parties, who appeared and made up the issue, and against whom the judgment is rendered, or for any inference of clerical *misprision*. The record more clearly shows an appearance, than in any of the cases referred to.

Affirmed.

Dunlap v. Steele & Vandergrift.

Trespass for Injuries to Personal Property.

1. *Possession, or title with right to immediate possession, necessary to maintain trespass.*—To maintain an action of trespass for injuries to personal property, the plaintiff must have, at the time of the injury, actual possession, or title and right to immediate possession.

2. *Mortgagee entitled to possession, unless contrary is stipulated.*—In VOL. LXXX.

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the absence of a stipulation, express or implied, to the contrary, the mortgagee has the right of immediate possession; but, if his right of possession is postponed until default, or until the happening of some future contingency, he can not maintain trespass for an injury to the property committed during the intervening period.

3. *Right of possession accrues to mortgagee upon happening of stipulated event.*—When the mortgage contains a stipulation authorizing the mortgagee to take possession, if default should be made in the payment of the secured debt at maturity, or if the property should be levied on, or taken possession of by a third person, the levy of an attachment on the property gives the mortgagee an immediate right of possession, and he may maintain trespass if the levy is forcible and unlawful.

4. *Sale of the property under the levy; when does not relate back to commencement of suit.*—The sale of the property under the levy, after the institution of the suit, does not relate back to the commencement of the suit, so as to constitute a cause of action at that time; but if the levy was a trespass, the subsequent sale may be considered in estimating the damages.

5. *Attachment by landlord of the mortgagor; mortgagee can not maintain trespass on account of the levy.*—If the attachment was sued out by the landlord of the mortgagor, who had furnished the mortgaged property as advances to make a crop, his lien is superior to the mortgage, and the mortgagee can not maintain trespass on account of the levy.

6. *Invasion of province of the jury.*—A charge which, on the facts hypothetically stated, withdraws from the jury the consideration of material inferences which they might have drawn, is an invasion of their province.

APPEAL from St. Clair Circuit Court.

Tried before GIDEON C. ELLIS, Esq., special judge.

This was an action of trespass, brought by Steele & Vandergrift, partners, against William Dunlap, for an alleged injury to certain personal property mortgaged to the plaintiffs. Defendant interposed the plea of not guilty. From the evidence, it appears that plaintiffs were merchants, doing business in Birmingham, Ala.; that one J. B. Simmons became indebted to them in the sum of seventy-five dollars, for which he executed his note on the 10th of March, 1881, due and payable on the first of November following, and to secure the same, and for future advances, said Simmons executed, on the same day, to plaintiffs, a mortgage upon his crops, to be grown the current year, and upon a mare. The mortgage contained provisions, that upon the removal from the county, of any of the mortgaged property, by the mortgagor, or a sale thereof by him, or in the event of a levy thereupon by any other person, the mortgagees should have the right to take immediate possession, and to sell the mortgaged property. The evidence further shows, that on the 8th day of October, of that year, the defendant, William Dunlap, sued out an attachment against the said Simmons, claiming a lien upon his crop and the mortgaged mare for rent, and advances made to him, by said Dunlap as landlord, and levied the same upon said crop, and said mare, which were afterwards sold under

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the attachment proceedings. It is for this sale of their mortgaged property by Dunlap, that plaintiffs sue to recover damages, alleging that he was guilty of a trespass. During the progress of the trial, plaintiffs offered their mortgage in evidence, which was objected to by the defendant, on the ground that it had not been shown, by plaintiffs, that any of the mortgaged property had ever been in their possession. The court overruled this objection, and defendant excepted. The defendant, testifying in his own behalf, offered to show that the mare in controversy was his, defendant's property, at the time of the execution of the mortgage by Simmons to plaintiffs. To this evidence plaintiffs objected, the court sustained the objection, and defendant reserved his exception. It was further shown by the defendant, that said mare was not sold until after the commencement of the present suit by plaintiffs.

The court, in the general charge, instructed the jury, "that, if they believed from the evidence that the mare embraced in plaintiffs' mortgage, was attached in the suit of the defendant against Simmons, and sold by the sheriff in said attachment suit, then the plaintiffs are entitled to recover for the value of the mare, and interest thereon from the date of the levy of the attachment." To the giving of this charge the defendant excepted. The defendant then asked the following written charge: "That if the jury believe from the evidence, that the mare in controversy was attached by defendant before the debt mentioned in the mortgage fell due, or prior to Nov. 1st, 1881, and if they further find from the evidence, that the mare in controversy was never in the possession of the plaintiffs, then plaintiffs are not entitled to recover in this form of action against defendant in this suit." The court refused to give this charge, and the defendant excepted. Judgment was for the plaintiffs, and the defendant takes this appeal, assigning for error the charge given by the court, *mero motu*, the charge refused, and the rulings of the court to which defendant had reserved exceptions during the progress of the trial.

INZER & GREENE, for appellant, cited *M. & M. R'way Co. v. McKellon*, 59 Ala. 458; *Pruitt v. Ellington*, 59 Ala. 454; *Davis v. Young*, 20 Ala. 151; 2 Brick. Dig., p. 473, § 58; *Nelson v. Bondurant*. 26 Ala. 341; *Boswell & Woolley v. Carlisle, Jones & Co.*, 70 Ala. 244.

BRADFORD & BISHOP, *contra*.—No brief came into the hands of the Reporter.

CLOPTON, J.—The gist of the action of trespass for in-
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juries done to personal property is the damage to the possession ; and to entitle a plaintiff to maintain the action, he must have, at the time of the injury, actual possession, or title and right to immediate possession. The general rule in respect to mortgages is, if the mortgage contains no stipulation or reservation to the contrary, the mortgagee has the right to immediate possession at any time—constructive possession—and may sustain an action for injury done to the property, though in actual possession of the mortgagor. But, if the mortgage contains a stipulation or reservation, express or implied, that the mortgagor shall retain possession and enjoyment until default, or until some contingency or event happens in the future, the mortgagee's right is in reversion ; and he can not maintain trespass for an injury to the property committed during the period the mortgagor has the right to possession, and is in actual possession.—*Boswell v. Carlisle*, 70 Ala. 244.

The mortgage, under which plaintiffs derive title, contains a stipulation, that the mortgagees are authorized to take possession, and sell the property, should the mortgagor fail to pay the indebtedness at the time and in the manner provided, or should sell or attempt to sell the property or any part thereof, or should move the same beyond the limits of the county, or should the property *be levied upon*, or taken possession of by any other person. The law day of the mortgage is November 1, 1881. In October preceding, the defendant sued out an attachment against the crops and the mare in controversy, as landlord, and caused it to be levied on the property embraced in the mortgage. By the terms of the mortgage, the mortgagees designed to secure the vantage ground of possession, if litigation ensued with any other creditor of the mortgagor, or with any other person, wrongfully taking possession of the property. The right to immediate possession is simultaneous with the levy. The moment the right to possession accrues, by reason of a levy being made, the mortgagees may maintain trespass if the levy is forcible and unlawful, being regarded as having the constructive possession.—*Nelson v. Bondurant*, 26 Ala. 341 ; *Welch v. Whitmore*, 25 Me. 86. The instruction, requested by defendant, was properly refused.

The court affirmatively instructed the jury, that the plaintiffs were entitled to recover on the hypothesis, that the attachment sued out by the defendant was levied on the mare embraced in the mortgage, and that the mare was sold by the sheriff in the attachment suit. The mare was sold after the institution of the present suit ; and the sale does not relate to the commencement of the suit, so as to constitute a right or cause of action at that time ; though, if the levy was a trespass, the subsequent sale of the mare may be considered in estimating the

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damages. But irrespective of this, all the hypothetic facts stated in the charge may exist, and the defendant may not, necessarily, be guilty of a trespass. The bill of exceptions recites, that there was evidence tending to show, that in October, 1881, the defendant sued out an original attachment against the crops grown by the mortgagor during the current year, and against the mare, the attachment being, or purporting to be sued out for rent and advances furnished the mortgagor by the defendant as landlord. The trespass complained of is the levy upon and seizure of the mare under this attachment, and under it the defendant justifies. If the defendant was in fact the landlord of the mortgagor, and as such landlord advanced the mare, under the statute, to the mortgagor as his tenant, his lien on the mare for the advance is superior to the lien of the plaintiffs' mortgage; and he had the statutory right to enforce the lien by the process of attachment, a statutory ground existing.—Code, §§ 3467, 3472. In such case neither the officer, who levied the attachment, nor the defendant, who caused it to be done, would be guilty of a trespass, though the mare were in the actual possession of the mortgagees. The writ of attachment and the levy were offered in evidence to prove the alleged trespass, without restricting their effect as evidence. The recitals of the attachment showed, that it purported to be sued out by the defendant as landlord for rent and advances. In the absence of contradictory evidence, the jury might have inferred the existence of the facts, which conferred on the defendant a superior lien. The charge invades the province of the jury, by withdrawing from their consideration material inferences, which they might have drawn from the evidence; and was improperly given.—*Agee v. Mayer*, 71 Ala. 88; *Rice v. Watts*, *Ib.* 593.

The defendant having sued out the attachment against the mare, having had it levied, and the mare sold in the attachment proceedings, as the property of the mortgagor, will not be heard to deny his title as against the mortgagees. There is no error in not allowing the defendant, under the circumstances of this case, to prove that the mare was his property at the time the mortgage was given, and the attachment was sued out.

Reversed and remanded.

Warten v. Matthews.

Bill in Equity by Creditors, to have Mortgage Declared and Enforced as General Assignment.

1. *Retroactive statutes.*—A retroactive operation will not be given to a statute, unless the legislative intent that it shall so operate is clearly expressed, or so clearly implied as to amount to an express declaration.

2. *Same; mortgage operating as general assignment.*—A mortgage conveying substantially all of a debtor's property, though given to secure a debt contemporaneously contracted, was declared and enforced as a general assignment, enuring to the benefit of the creditors equally (Code, § 2126), prior to the amendment of that statute, which excepts them from its operation (Sess. Acts, 1882-83, p. 189); and the amendatory law, not clearly appearing to have been intended to be retroactive in its operation, will not be construed to apply to mortgages executed prior to its enactment.

APPEAL from the Chancery Court of Limestone.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 12th April, 1884, by Henry Warten, as a creditor of Luke Matthews, against the said Matthews, together with A. C. Legg and W. B. Tanner, the latter being sued both individually and as trustee; and sought to have two mortgages, executed by said Matthews to said Legg and Tanner respectively, declared and enforced as a general assignment, enuring to the benefit of all the creditors of said Matthews equally. The mortgages, copies of which were made exhibits to the bill, were each dated February 19, 1883, and conveyed the same lands. The mortgage to Legg recited as its consideration an indebtedness of \$ 2,500, "money this day borrowed," as evidenced by promissory note of the same date, payable the 19th February, 1884; and the mortgage to Tanner, which recited the prior existence of the mortgage to Legg, was given to secure a prior indebtedness of \$953 due March 1, 1884. The bill alleged that Matthews was indebted to the complainant, at the time these mortgages were executed, on balance of account contracted in 1882, and account contracted in the early part of the year 1883, in the sum of more than \$2,000; that he was also indebted to other persons, in amounts unknown to complainants, and was in fact insolvent; and that the lands conveyed by said mortgages "was and is substantially all the property owned by said Matthews."

The defendants filed a joint and several demurrer to the bill,

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assigning thirteen specific grounds of demurrer; one of which was, "that the bill shows on its face that the mortgage to said Legg was executed in consideration of money advanced and paid by said Legg to said Matthews contemporaneously with the execution of said mortgage." The chancellor sustained the demurrer as to Legg, but without stating on what ground, and overruled it as to the others. The complainant appeals from this decree, and assigns as error the sustaining of the demurrer in favor of Legg.

CABANISS & WARD, and W. R. FRANCIS, for appellant.

McCLELLAN & McCLELLAN, *contra*.

SOMERVILLE, J.—Section 2126 of the Code of 1876, prior to amendment, read as follows: "Every general assignment made by a debtor, by which a preference or priority of payment is given to one or more creditors over the remaining creditors of the grantor, shall be and enure to the benefit of all the creditors of the grantor equally." On February 23, 1883, this section was amended by the General Assembly, by adding the following clause: "but this section shall not apply to, or embrace, mortgages given to secure a debt contracted contemporaneously with the execution of the mortgage, and for the security of which the mortgage was given." Acts 1882-83, p. 189.

The purpose of this amendment, very clearly, was to obviate the construction placed on section 2126 by this court in *Shirley v. Teal*, 67 Ala. 449, and again in *Danner v. Brewer*, 69 Ala. 191, where it was held that the section did apply to mortgages given to secure a debt contracted contemporaneously with the execution of the mortgage. The mortgage sought to be declared a general assignment in this case was executed on February, 19, 1883, or four days prior to the date of the above amendment. The chancellor construed the amendment to be retrospective, so as to be applicable to this case. This, we think, was erroneous.

There is no clause, it is true, in our Constitution, which forbids legislation merely because it may be retrospective, without its being obnoxious also to other objections. But, inasmuch as legislation of this character is very liable to abuse, and frequently oppressive in its effects, the courts have uniformly adopted the rule, that statutes should generally be construed to operate in the future only, unless the legislative intent appears clear from their terms that they are to have a retrospective operation. Cooley's Const. Lim. (5th Ed.) 456, *370. Especially is this the case, where the tendency of a statute is to

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impair or destroy vested rights which may have been previously acquired. Sedgwick on Stat. and Const. Law. (2nd Ed., Pomeroy), 161, *note*, 346. The rule is often stated to be, that such a construction, when it operates to take away vested rights, whether legal or equitable, is not to be admitted, "unless the implication is so clear as to be equivalent to an explicit declaration."—*Osborn v. Nicholson*, 13 Wall. 654, 662.

We do not doubt that the complainants, as creditors of the mortgagor, acquired valuable vested rights under the mortgage in question, which could not be taken away by subsequent legislation. They acquired an equitable title or lien which enured to their benefit through the influence of section 2126 of the Code. This lien is not like that of an attachment or judgment, which is created by law, and may be abrogated in like manner. But it springs out of the contract of assignment, having its peculiar character impressed upon it by the statute, just as the lien of a landlord for rent springs from the contract of renting, although given by statute.—*Knighton v. Curry*, 62 Ala. 404; *Dallas County v. Timberlake*, 54 Ala. 403; *McDonald v. Morrison*, 50 Ala. 30.

The mortgagee, or trustee, represents the creditors, taking and holding for them in trust the legal title. The conveyance of the property being a benefit intended for the creditors of the grantor, no express acceptance of it is requisite, but their assent is implied. When such conveyance is a general assignment, by reason of having transferred substantially all of the debtor's property, it is such by reason of the attendant facts existing at the time of its execution, and not by reason of any decree of a court so declaring it, upon judicially ascertaining the truth of such facts. The effect of the statute is "to engraft upon it a trust for the benefit of all creditors." *Danner v. Brewer*, 69 Ala. 191, 200; *Perry Ins. & Trust Co. v. Foster*, 58 Ala. 502, 522.

The necessities of this case do not require us to decide that, if the amendment under consideration could be construed to be retrospective, it would be liable to several serious constitutional objections, as materially impairing and lessening the value of an existing contract; or as taking away the citizen's private property without due process of law, and without just compensation. *Edwards v. Williamson*, 70 Ala. 145; Sedgwick on Stat. & Const. Law (Pomeroy), 346. It is sufficient for us to decide, as we do, that this amendatory statute has no retrospective operation, so as to affect general assignments made before the date of its enactment. It must be construed to be prospective only.

We have examined the other grounds of demurrer, and consider them not to be well taken.

Reversed and remanded.

CASES

IN THE

SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1886.

Johnson *et al.* v. McLeod, Adm'r.

Statutory Detinue for Staves and Saw-Logs.

1. *Assessing separate value of articles sued for.*—In an action for the recovery of personal property *in speciē*, the articles sued for being described in the complaint as “one lot of staves and saw-logs,” a verdict for the plaintiff should assess the value of the staves and logs separately (Code, § 2944); and if only their aggregate value is assessed, a judgment following the verdict is erroneous.

APPEAL from Clarke Circuit Court.

Tried before Hon. WM. E. CLARKE.

This action was brought by Amos N. McLeod, as administrator of the estate of Daniel McLeod, deceased, against William Johnson and Rab. Etheridge, to recover “one lot of staves and saw-logs,” and was commenced on the 25th day of September, 1885.

The defendants filed pleas, denying the plaintiff's right to maintain the suit, claiming that the defendants held the land from which the staves and logs were taken, under a lease from Thos. S. King, as executor of the estate of Thomas Malone, deceased, and that the land belonged to said estate. The record states that the plaintiff amended his pleadings, but in what respect, is not shown. On the trial evidence was offered by the defendants to show that a part of the timber and staves in controversy were cut on the land of one L. J. Wilson, for which they had paid said Wilson, and that the staves made from timber on said Wilson's land had been hauled to the river and there mixed by the defendants with the staves got from the land claimed by the plaintiff to belong to the estate of Daniel McLeod, so that they could not be distinguished or separated.

The defendants asked the court to charge the jury in sub-

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stance that if they found that the staves in controversy were taken partly from other lands than that claimed by the plaintiff, and in which the plaintiff had no interest, and the plaintiff had failed to point out which staves belonged to him and which to defendants, that then they should find for the defendants—which charge the court refused to give. The jury found a verdict for the plaintiff as follows: “We, the jury, find for the plaintiff, and assess the value of the property sued for at \$189.” The defendants moved the court to set aside the verdict, which motion was overruled. The defendants take this appeal and assign for error: 1. That the court erred in rendering judgment on the verdict, since the verdict did not assess the value of the articles separately. 2. That the court erred in refusing to give the charge asked by the defendants.

H. AUSTILL and R. T. ERVIN, for appellants.—1. The verdict of the jury should have assessed the value of the timber and staves separately.—2 Waite’s Ac. & Def. 538; 4 Stew. & Port. 357; 7 Ala. 189; *Ib.* 807; 76 Ala. 310; 76 Ala. 310. 2. The plaintiff must have the legal title and right to immediate possession of the entire chattel sued for.—74 Ala. 432. The chattel must be such as can be distinguished from others by some certain means.—2 Waite’s Ac. & Def. 331; Smith’s Man. Com. Law, 502. The staves having been innocently mixed by the defendants they became tenants in common of the whole lot, and therefore the plaintiff could not have such legal title to any part of them as would enable him to maintain the action of detinue.—54 Am. Decisions (note) 597; 21 Pick. 298; Schouler on per. prop. 48; 54 Am. Dec. 594 (note). Charges asked by defendants should have been given as they asserted the proposition that the plaintiff, to maintain this action, must have the entire interest in the chattel sued for. 1 Stew. 536; 7 Ala. 9; 11 Ala. 609; 21 Ala. 549; 2 Waite’s Ac. & Def. 536.

IRA D. PORTIS and S. J. CUMMING, *contra*.—1. The general principle, that each article sued for in an action of detinue must be assessed separately by the jury, in their verdict for the plaintiff, is conceded. The statute, however, allows a discretion, and limits the operation of the general principle to cases where it is “practicable.”—Code 1876, § 2944. This court has recognized and enforced this statutory limitation.—*Haynes v. Crutchfield*, 7 Ala. 189; *Eslava v. Dillihunt*, 46 Ala. 998; *Wilson v. Barnes*, 49 Ala. 134. In 4 Stew. & Port. and 7 Ala. 198, cited by appellants, the decisions were rendered before the insertion of the words, “if practicable,” in the statute.—Clay’s Dig. p. 319. In *Jones v. Anderson*, 76 Ala. the articles or

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subject of suit were held to be of such a character, like "slaves, horses and mules," that it would have been practicable to assess their value separately, but staves and logs have not such distinctive individuality, and it was within the discretion of the jury to value the whole lot sued for. See also *Townsend v. Brooks*, 76 Ala. 308, where it was held that on the trial of the right of property it is not necessary to assess each bale of cotton separately. As to mixing staves of plaintiff with those of defendants, see *Lehman, Durr & Co. v. Kelly*, 68 Ala. 193; 54 Am. Dec. 591 (note).

STONE, C. J.—The present suit was an action "for the recovery of personal property in specie," a statutory substitute for the common law action of detinue.—Code of 1876, §§ 2942, *et seq.* On all questions material to the present investigation, the statutory action is not essentially different from its common law prototype. The property sued for is described in the complaint as "one lot of staves and saw-logs." It has the same description in the replevin bond, and in the verdict of the jury finding for the plaintiff. The verdict, which is copied in the judgment-entry, is in the following language: "We, the jury, find for the plaintiff, and assess the value of the property sued for at \$189." The judgment follows the verdict.

The description, as we have seen, is *one lot* of staves and saw-logs. We must be presumed to know there is a wide difference between staves and saw-logs, and they constitute distinct classes. As distinct as, if not more widely different from each other, than cotton in bales, and cotton in the seed. Though called one lot, they were manifestly two lots, and their value should have been assessed separately.—*Townsend v. Brooks*, 76 Ala. 308; *Jones v. Anderson*, *Ib.* 428, and citations. "The judgment, following the verdict, is necessarily erroneous in the foregoing particular, and it must be reversed." We consider it unnecessary to notice the questions raised by the charges asked, as there is nothing in them.

Other questions are referred to in argument, but the record does not raise them.—*Cooper v. Watson*, 73 Ala. 252; *Mills v. Clayton*, 81 Ala.

Reversed and remanded.

Butler v. Jones.*Trover.*

1. *Revision of judgment of Selma City Court, under special statute.* In reviewing a judgment of the City Court of Selma, rendered by the court without the intervention of a jury (Sess. Acts 1875-6, p. 390, § 14), this court is not allowed to indulge any presumption whatever in favor of its findings on the evidence.

2. *What constitutes conversion; demand and refusal.*—A demand and refusal are, generally, evidence of a conversion; but a qualified, conditional, and reasonable refusal, is not evidence of a conversion; as where the defendant, being the owner of premises which had been leased, and in possession of furniture left on the premises by a deceased tenant, refuses to deliver it on demand by the owner, who had lent it to the tenant, unless identified by him or some other person.

3. *Unrecorded loan of personal property.*—Possession of personal property for three years, under an unrecorded loan, vests in the loanee an absolute title as against *bona fide* creditors and purchasers (Code, § 2173); but, as against all other persons, the statute neither confers any rights on him, nor takes away any rights from the lender.

4. *Testimony of party, as to transactions with decedent.*—The estate of a deceased tenant, who died in the possession of personal property which had been lent to him, is not interested in the result of a suit brought by the lender against the landlord, to recover damages for the conversion of such property (Code, § 3058); and therefore, in such action, the plaintiff may testify as to any relevant fact showing the bailment.

APPEAL from the City Court of Selma.

Tried before the Hon. JON HARALSON.

This was an action of trover to recover damages for the alleged conversion of certain articles of office furniture consisting of table, desk, chairs, &c.; and was commenced on 30th August, 1884. Issue was joined on the plea of the general issue, the trial resulting in a verdict and judgment for the plaintiff.

As shown by the bill of exceptions, the articles in question were loaned by the plaintiff to one S. J. Howard, a justice of the peace in the city of Selma, and remained in his possession until his death, which occurred in January, 1884. These articles were used by said Howard to furnish his office, which he rented from the defendant in the present action. The following receipt, taken at the time of the bailment, was introduced in evidence by the plaintiff and identified by John Howard, son of said S. J. Howard, deceased: "I have borrowed from Abner Jones his office furniture subject to his

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order, March 1st, 1880." To the introduction of this writing, and its consideration as evidence, the defendant objected as being inadmissible under sections 2173 and 2174 of the Code, and duly excepted to the adverse ruling of the court. The said John Howard testified that about two weeks after the death of his father, he went to his office to collect his papers and get the furniture, supposing it had been his fathers' property; and had loaded a dray with the various articles, preparatory to their removal, when the defendant "discovered it and stopped it, and asked what he was going to do with the articles. I informed him I had taken them as my father's property, and was collecting them together to take care of. Defendant said I could not do that as my father owed him for the rent of the office, and he claimed a lien on the property for the payment of what was due him by my father for rent. I then carried all the articles back, except the papers I had in a box." The plaintiff introduced testimony as to refusals of the defendant, upon application, to surrender the articles alleged to have been converted, the essential portion of which is indicated in the opinion. The plaintiff, as witness in his own behalf, testified "that when I went out of office (he had been said Howard's predecessor as a justice of the peace) I had a table and a desk, thirteen chairs, one Form Book, two inkstands. I turned them over to Howard. I went to Howard's office about ten days before his death, and told him I wanted my furniture. He replied that he did not know what he would do, and I went away and let him keep the things longer. On this visit I saw the table, desk, &c." The plaintiff testified as to the value of the articles, and that "he never had received any message of any kind from the defendant." The defendant objected to the testimony of plaintiff: (1.) As to what property he had delivered to Howard; (2.) As to his conversation with Howard; (3.) As to what he saw in Howard's office, and the value of the same. The court overruled the objections and the defendant excepted; and here assigns the same, with the ruling above noted permitting the introduction of the receipt, and the finding of the court that the defendant was guilty of a conversion under the evidence, as error.

SUMTER LEA, for appellant.

B. F. SAFFOLD, *contra*.

SOMERVILLE, J.—1. The present appeal from the City Court of Selma presents for our review the conclusion and judgment of the court upon the evidence, as well as upon the law of the case, the trial in the lower court having been con-

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ducted without a jury. And in passing upon the evidence we are required to do so without any presumption in favor of the ruling of the City Court in behalf of the appellee, who was plaintiff in the court below, and obtained judgment against the appellant, as defendant. Acts 1875-6, p. 386, and p. 390, section 14.

2. The evidence fails, in our opinion, to show a conversion of the property sued for, such as will maintain an action in trover. It is not denied that the plaintiff was the owner of the property, or that the title and right of possession were vested in him. This is clearly shown. The only question is whether the defendant was guilty of exercising over the property any dominion in exclusion or defiance of the plaintiff's right, by wrongfully detaining it from him after demand for its delivery. The chattels in controversy, consisting of office furniture and other articles, about eighteen in number, were loaned by the plaintiff to one Howard, in March, 1880, he being at that time a tenant of the defendant, and in the use of the chattels on the leased premises up to the time of his decease, which occurred in January, 1884. The property was thus left on the premises in the constructive possession of the defendant. It is shown, that, when the agent of the plaintiff demanded the possession of the articles, the defendant asked him if he knew and could point out the things which belonged to the plaintiff, to which he replied in the negative. The defendant then said, "*Let Mr. Jones (the plaintiff), or some one who knows the things, come and get them;*" that Mr. Howard owed him for rent of his office, and he would hold whatever belonged to Howard for this rent, under the lien which the law gave him." This qualified refusal is the gist of the alleged conversion, upon which the action is founded.

While the law is, that a demand and refusal are generally *prima facie* evidence of a conversion, a qualified, reasonable and justifiable refusal is no evidence of a conversion. It takes a wrongful refusal to constitute the defendant a tortfeasor, and in the absence of such evidence there can be no conversion. It is well settled that the possessor of goods may refuse to deliver them up until the claimant makes some proper and reasonable show of ownership, which necessarily includes the fact of identification.—2 Greenl. Ev. §§ 644-645; 1 Addison on Torts (Wood's Ed.) §§ 472-473, 475.

The refusal of the defendant in this case was not absolute, but qualified and conditional. And this qualification was, in our judgment, reasonable and justifiable. It may have been necessary for the protection of the defendant against a double liability. This view is supported by all of the best law writers who generally follow the case of *Green v. Dunn*, 3 Campbell

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216, which is closely analogous to the case in hand. The defendant, on taking possession of premises which had been leased, found some timber which had been deposited there by permission of the previous occupant. Upon demand being made for it by the owner, the defendant replied: "If you will bring any one to prove it is your property I will give it you, and not else." This was held to be a reasonable and qualified refusal, and not to constitute a conversion. The principle settled is conclusive of this case.

3. The objection was not well taken to the admission in evidence of the receipt of Howard to Jones, the plaintiff, showing a loan of the property in controversy by the latter to the former more than three years before the bringing of this suit. The case is unaffected by section 2173 of the Code, of 1876, which provides that all loans in writing, under which possession is suffered to remain for three years with the party entitled to the use, shall vest an absolute estate in the loanee "*as to creditors and purchasers of such person,*" unless such loan is recorded, within such time, in the county where the property is located. The purpose of this statute, which is unlike any provision found in the English statute of frauds, was to prevent the creation of debts or procurement of credits, by false appearances, such as would naturally follow in bailments of this character, upon the faith of the possession of personal property by the borrower, who might be supposed to be the true and real owner; and also, to protect purchasers from the loanee against the defects of his title. It was never intended to interfere with, or create any new rights as between lender and borrower of the property. Its sole purpose is to protect the rights of third persons who may be creditors of the loanee, having extended such credit after the lapse of the three years designated, and to protect *bona fide* purchasers of the property from him, who may acquire title after the expiration of such period.—*Durden v. McWilliams*, 31 Ala. 206. The loans condemned by the statute are deemed fraudulent as to these two classes, being as to them transmitted into absolute sales.

The receipt in question was competent to show ownership of the property sued for in the plaintiff.

4. The estate of Howard was in no manner interested in the result of this suit, and the plaintiff was, therefore, a competent witness to testify, as against the defendant, Butler, to any relevant fact showing a bailment of the property to Howard during his lifetime. He would not be debarred from testifying to any transaction with, or statement by Howard, by reason of the provisions of section 3058 of the Code of 1876. This section has no application unless the transaction, or statement sought to be proved, occurred with a deceased person whose

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estate is interested in the result of the suit in which the evidence is offered; or unless the deceased was at the time acting in a representative or fiduciary relation to the party against whom such testimony is sought to be introduced.—Code, 1876, § 3058; *Hendricks v. Kelly*, 64 Ala. 388.

The court below erred in holding that there was any conversion proved, and in rendering judgment for the plaintiff.

Reversed and remanded.

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Trial of the Right of Property.

1. *General charge on evidence; when properly refused.*—A general charge on the evidence, in favor of either party, is properly refused, when there is any conflict in the evidence as to a material fact, or evidence from which the jury might draw an inference adverse to him.

2. *Partner's interest in partnership property; execution against.*—A partner's individual share in any particular partnership property is not subject to levy and sale under execution against him; and if an execution against one partner is levied on partnership property, and a statutory claim is interposed by his co-partner, the plaintiff is not entitled to have a one-half interest in said property declared subject to his execution.

3. *Assessing separate value of articles levied on.*—On the trial of a statutory claim suit for four yokes of oxen and two carts, verdict and judgment being rendered for the plaintiff in execution [Code, § 3343], the value of each article must be assessed separately, and it is error to assess a gross sum as the aggregate value.

APPEAL from Clarke Circuit Court.

Tried before Hon. WM. E. CLARKE.

John F. Murphy recovered a judgment against Barron and H. E. Tait, at the fall term 1885 of Clarke county Circuit Court, and an execution on said judgment, issued on the 24th of November, 1885, was levied, by the sheriff, on four yokes of oxen, one front-cart and one tail-cart, as the property of J. W. Barron and H. E. Tait, the defendants in execution. W. R. Tait claimed the property levied on as belonging to him, made affidavit and gave a claim bond, whereupon the levy was released. The cause was tried on an issue made up under the direction of the court, as required by the statute, the trial resulting in a verdict and judgment for the plaintiff for "one-half of the property levied on," and the jury "assessed the value of said one-half at one hundred and fifty dollars." The judgment followed the verdict, condemning to the satisfaction

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of plaintiff's demand one-half of the property levied on. On the trial the plaintiff sought to show that the property in controversy belonged originally to one of the defendants in execution, H. E. Tait, and had been fraudulently transferred to claimant, to protect it from plaintiff's execution. The claimant sought to show that the property had never belonged to said defendants, or either of them.

In proof of his contention, the plaintiff offered the sheriff, who made the levy, as a witness, who testified that when he went to the camp of the defendant, H. E. Tait, to levy the execution, and which he did levy on the oxen and carts in controversy, the claimant, William R. Tait, claimed the property as his, and showed witness a bill of sale, dated March 1st, 1884, from H. E. Tait, selling to claimant "four yoke of oxen, two front-carts and one tail-cart," which bill of sale, upon request from the plaintiff, was produced and put in evidence. Other witnesses were offered by the plaintiff to show that the oxen and carts were the property of H. E. Tait, and that the pretended sale to claimant was without consideration and fraudulent. The claimant, examined as a witness in his own behalf, testified that a part of the property levied on was purchased by him from one Wainwright, a part from M. G. Candee, a part from Mrs. Bradley, an ox from Osceolo Tait and one ox from a negro named Jordan; that no part of the property in controversy was embraced in the bill of sale from H. E. Tait. The witness further testified that the oxen and carts bought from H. E. Tait were in payment of a just debt of above five hundred dollars, which said H. E. Tait owed him, and that the value of the property named in the bill of sale was of less value than the amount of the debt.

Upon the evidence, the court charged the jury, among other things, "That they should determine, from the evidence, whether, if the property levied upon did not belong exclusively to H. E. Tait, it belonged to the firm of Tait & Tait, and if they found it did so belong to Tait & Tait then they must find that one-half of it was subject to the plaintiff's execution." To the giving of this charge the claimant excepted.

The claimant, among other charges, asked the court to give the affirmative charge, that if the jury believed the evidence they should find for the claimant, which charge was refused.

Charge number 3 asked by the claimant was as follows: "Even if the jury believe from the evidence that any part of the property levied on was acquired by Wm. R. Tait under the bill of sale, yet if the unimpeached and uncontradicted evidence shows that the bill of sale was to pay, and did pay at a fair valuation, to Wm. R. Tate, a debt due from Hez. Tait to him, it is immaterial whether Hez. Tait, in paying said debt, designed

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to defraud Murphy, and whether William Tait participated in any such design ;" which charge was also refused by the court.

The claimant takes this appeal, assigning as error the adverse rulings of the court above noted.

H. PILLANS, for appellant.—1. The judgment in this case is erroneous. It follows the verdict, and like it, fails to assess the value of each article levied on separately.—*Townsend v. Brooks*, 76 Ala. 308 ; *Johnson v. McLeod*, adm'r, 80 Ala. 433. 2. The court erred in its charge in reference to the property claimed as belonging to the partnership of Tait & Tait, as there was no evidence of such partnership, or that the property belonged to such partnership. Even had there been evidence to support such charge, the instruction was wrong to find that one-half of said property was subject to plaintiff's execution, since only the *interest* of a partner in a partnership can be subjected to an execution against him, which can only be determined after the settlement of the partnership. Charge numbered 3 should have been given.—*Meyer v. Sulzbacher*, 76 Ala. 120 ; *Hodges v. Coleman*, 76 Ala. 103.

J. W. PORTIS and S. J. CUMMING, *contra*.—No brief came into the hands of the Reporter.

CLOPTON, J.—The issue joined on the trial is, whether the oxen and carts levied on are subject to plaintiff's execution. The plaintiff claimed, that they were the property of H. E. Tait, one of the defendants in execution, and that he had fraudulently sold and conveyed them to appellant, who is the claimant. The claimant denied that they were ever the property of H. E. Tait ; and it appearing that, in March, 1884, he had obtained from the defendant in execution oxen and carts, he introduced evidence to show, that prior to the levy he had sold some of the oxen thus obtained, and the others had died, and that those levied on were bought from other persons. having never belonged to H. E. Tait. On this evidence the claimant asked the court to give the affirmative charge as to the oxen. If this version be true, of course the oxen are not subject to plaintiff's execution. But there was other evidence which raised a question respecting the identity of the property, and in support of this issue, in his favor, the plaintiff proved, that when the officer went on a former occasion to make a levy, the claimant asserted title to the property, and as his source of title exhibited a bill of sale executed by H. E. Tait, which on demand of plaintiff was produced by claimant on the trial. Though the production of the bill of sale and claiming thereunder, do not operate to prevent claimant to show, that the oxen in fact

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never belonged to H. E. Tait, his assertion of title as made to the officer is a circumstance proper to be considered by the jury on the question of identity. The affirmative charges requested by claimant would have withdrawn this evidence from the consideration of the jury, and were therefore properly refused. Such charge should not be given, if there is evidence, though slight, authorizing an adverse inference.

The jury, as is evident from the verdict, having found the property in controversy to be the property of the firm of Tait & Tait, under an instruction from the court, subjected one-half thereof to the payment of the execution. Assuming that there was evidence on which to base the hypothesis of the charge, which, however, is not disclosed by the record, it asserts an erroneous proposition. The interest of a partner is his share of the proceeds of *all* the partnership effects, after the liabilities have been satisfied. Such *interest* may be levied on and sold under an execution against the goods of the individual partner. A partner does not separately own, or have right of exclusive possession to, any particular article of the partnership property, or aliquot part thereof. The real ownership and the legal title are vested in the firm.—*Daniel v. Owens*, 70 Ala. 297; *Farley v. Moog*, 79 Ala. 246. If it be true, that the oxen and carts levied on are the property of a partnership, composed of the claimant and the defendant in execution, one-half thereof cannot be levied on and sold under an execution against the latter as his share. If not subject to levy and sale, the plaintiff is not entitled to condemn such share to the payment of his execution on a statutory trial of the right of property. If such be the facts, he fails to sustain the issue, that the property is subject to his execution, and the jury should have been so instructed on the hypothesis of the charge.

By the statutes providing for and regulating the trial of the right of property when levied on under execution and claimed by a third person, it is declared, that if the jury subject the property to the payment of the execution, "they must assess as far as practicable, the value at the time of trial of each article separately."—Code (1876), § 3343. The jury assessed the value of the property condemned at the gross sum of one hundred and fifty dollars. It was practicable to have assessed the value of each article separately; and on the authority of *Townsend v. Brooks*, 76 Ala. 308, the failure to do so is a reversible error.

Charge number 3 asked by claimant is defective in that it requires the court to instruct the jury as to the sufficiency and credibility of oral testimony.

Reversed and remanded.

Dawson v. Sayre.

Mandamus on Relation of Clerk of City Court, against President of Board of Inspectors of Convicts, in matter of Costs.

1. *Judgment for costs, on joint conviction of two or more defendants.*—When two or more persons are jointly indicted for a felony, jointly tried and convicted, whether a joint judgment is rendered against all, or a separate judgment against each, each is liable for the entire costs; though but one payment can be enforced, and, in the event of unequal payments, contribution may be recovered as between themselves.

2. *Same; apportionment of costs.*—In joint prosecutions, there may be cases in which the court should not tax the entire costs against the defendants who are convicted, including the costs of witnesses for those who are acquitted; but, when all are convicted, and the whole costs are adjudged against each, the clerk has no authority to apportion the costs among them, thereby reducing the amount in each case to less than \$150, and require the president of the board of inspectors of convicts to deliver his certified statement of the costs to the contractor to whom the convict is assigned and delivered, and who is required to pay to the clerk the full amount of the costs so certified, not exceeding \$150 in one case.

APPEAL from the City Court of Montgomery.

Heard before the Hon. THOS. M. ARRINGTON.

This was an application by petition, on the relation of A. D. Sayre, clerk of the City Court of Montgomery, for a *mandamus* to R. H. DAWSON, as president of the board of inspectors of convicts, requiring him to deliver certified bills of costs, as made out by the petitioner and approved by the presiding judge of the City Court, to the contractor to whom the several convicts were assigned and delivered. There were four convicts (Price Washington and three others), who were jointly indicted, tried and convicted of arson in the second degree, and sentenced to the penitentiary each for the term of five years. The entire costs, as shown by the clerk's certificates, amounted to \$349.70; and this sum was apportioned by the clerk equally among the four defendants, as shown by his memorandum at the foot of each, in these words: "There were four defendants, and one-fourth of the costs, or the amount of \$87.42½, is taxed against each defendant;" and each of these certificates was approved as correct by the presiding judge of the court, as shown by his indorsement. Dawson, as president of the board of inspectors, refused to approve or to deliver the certificates to the contractor, except for the reduced sum of \$37.50 each,

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or \$150 in all; and hence this application for a *mandamus* to compel him. The judgment of conviction, in which the costs accrued, is not set out in the record. The City Court granted the *mandamus* as asked, and its judgment is now assigned as error.

THOS. N. McCLELLAN, Attorney-General, for the appellant.

TENNENT LOMAX, *contra*.

STONE, C. J.—The present suit arose under act No. 46, approved February 28, 1887, Acts Ala. 1886–87, pp. 186–7; amendatory of a former statute. The whole statute relates to the payment of costs by the hirer of persons convicted of penitentiary offenses. The provisions of the statute are, that “whenever a person is convicted and sentenced to the penitentiary, the clerk of the court of the county in which the conviction was had, shall forward to the president of the Board of Inspectors of convicts a certified copy of the bill of costs in the case, which said copy of the bill of costs shall be delivered to the contractor to whom said convicts is assigned, along with the written order for the delivery of said convict to him; and said contractor, to whom said contract is delivered, shall, as soon as said convict is delivered to him, pay over to the clerk of the court in which the conviction is had, the full amount of the costs of the case, exclusive of the costs of feeding the convict while in jail, but in no case more than one hundred and fifty dollars.”

Four persons were jointly indicted, tried, and convicted of arson. The sentence of imprisonment in the penitentiary was the same as to each of the convicts—a term of five years. The judgments of conviction and sentence are not before us, and hence we can not determine in what form they were entered up. Nor are we sufficiently informed of the facts which transpired on the trial, to enable us to determine absolutely how the judgment for costs should have been rendered. Being indicted, tried, and convicted together, this furnishes evidence that they had jointly committed a single offense, in which they all participated. And the testimony for and against one, may have been the testimony for and against all. If such was the case, it can not be questioned that each defendant was liable to pay the whole costs, and to have a judgment rendered against him for the whole costs.—*McLeod v. State*, 35 Ala. 395. This was their liability to the State; but only one payment could be enforced. Neither the State nor the officers could claim double payment; but for one full payment the remedy was unobstructed, against all the defendants, or any one or more of

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them. Between themselves, the defendants, if they paid unequally, could recover contribution, one from another.

In *Coleman v. State*, 55 Ala. 173, two defendants were jointly indicted, tried and convicted of one and the same offense, and separate punishments imposed on each. The punishment was hard labor for the county. The costs not being paid, additional punishment was imposed on each of them for the entire costs of the prosecution. This, if enforced, would have been double payment of costs. This court reversed the ruling, so far as it adjudged a double payment of costs, and stated "that the additional term, to which each should be subjected, ought to be so long only as would pay one-half the costs and fees." The question was one the legislature had made no express provision for, and we announced the rule as the best we could do under the circumstances. We are not disposed to disturb it, but will enforce it in all cases which present the question in the form then before us.

As we have said, the judgment by which the prisoners were pronounced guilty is not before us. In the application for *mandamus* it is not shown that the costs were divided or apportioned among the defendants. On the contrary, the averment is, that the clerk himself took the aggregate of the costs and divided the sum equally between the four defendants; thus producing a sum against each, less than one hundred and fifty dollars. The inference from the averments of the petition, or relation, is, that the presiding judge did not apportion the costs among the defendants, but that he adjudged that each defendant was held for the whole costs. If he so decided, we are not able to perceive, even if the question was before us, that in so doing he committed any error. As we have said, all the defendants are jointly and severally liable for the common costs of a joint prosecution, which ends in their conviction; and a judgment so pronounced constitutes the "costs of the case," within the meaning of the statute we are interpreting. *Dent v. State*, 42 Ala. 514.

It is not our intention to decide that in all cases of joint prosecution, all the costs must be adjudged against those found guilty. Testimony might be produced which could affect only a part of the defendants, and would be useful only in exculpation of a part of those on trial. In such case, costs incurred in the successful defense of one or more defendants, should not be taxed against those on whose guilt or innocence it could shed no light. And we may add, no double collection must be made, nor must the judgment be so rendered as to produce a double collection. A money judgment, however, one or more, rendered jointly against all the defendants, or severally against each, for the whole costs, leads to no such result.

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Full payment of one such judgment satisfies all, and on motion, satisfaction will be ordered of record.

The relation fails to show a case for relief, and must be quashed at the costs of the relator, incurred in the court below and in this court.

Reversed and rendered.

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Action on Common Count for Money Had and Received.

1. *Judgment against garnishee, and payment thereof, as defense to action.*—When a garnishee, against whom a judgment has been rendered by a justice of the peace, sets up the payment thereof in defense of an action by a claimant of the condemned debt, mere irregularities in the judgment do not invalidate it, if the justice had jurisdiction of the subject-matter and the parties; but, his jurisdiction being purely statutory, his authority to render the judgment must affirmatively appear.

2. *Same; notice to adverse claimant, and contest with him.*—If the garnishee, admitting his possession of money, states that it is claimed by a third person, the proceedings against him must be suspended, and a notice issued to such third person to appear and contest with plaintiff the right to the money (Code, §§ 3302-03); and if, instead of such notice, the plaintiff sues out a garnishment against such third person, and contests his answer, this amounts to an abandonment or discontinuance of the proceeding against the former garnishee, and is available to him as a defense against a judgment; and if a judgment is wrongfully entered by the justice against both of the garnishees, which is reversed on appeal by the second, but is paid by the first, such payment is no defense to an action against him by the other.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by Jacob Levinshon, against Joseph R. Edwards, as the surviving partner of the late firm of Chamberlain & Co., to recover the amount due on four written instruments, called "Seamen's Advance Notes," of which the plaintiff claimed to be the owner by assignment, and which were directed to said Chamberlain & Co., with whom money was deposited to pay them when they became due. The original complaint contained a special count on the notes, and the common count for money had and received; but a demurrer was sustained to the special count. On the first trial, the plaintiff took a nonsuit, with a bill of exceptions; and the judgment was set aside, on his appeal, and the cause remanded.—*Levinshon v. Edwards*, 79 Ala. 273. On the second trial, as the record now shows, the defendant filed a special plea, setting up

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a judgment rendered against him by a justice of the peace, in a proceeding by garnishment at the suit of one Waganer, who sought to condemn the notes, or the money in the hands of Chamberlain & Co., as the property of Hugh Fox and wife; and the plea alleged that, the garnishee having suggested that Levinshon claimed the notes and the money, "thereupon said Levinshon (plaintiff) propounded his claim to said money, and said Waganer contested said claim; and such proceedings were had thereon before said justice of the peace, that said justice, on the 27th March, 1884, adjudged that said Levinshon was not the owner of said notes, but they were the property of said Fox, and rendered judgment in favor of said Waganer, against this defendant as garnishee, for the sum of \$100, with costs of suit, which judgment has been fully paid and satisfied by this defendant." To this replication the defendant filed a special rejoinder, alleging that he was never notified to appear and propound his claim in said suit, and never appeared or propounded it; that he was summoned as a garnishee in said suit, and answered denying any indebtedness, &c.; that his answer was contested, and judgment was rendered against him by the justice; and that this judgment was reversed, on his appeal, by the City Court of Mobile. The record does not show any ruling of the court on this rejoinder, but shows a judgment on verdict for the plaintiff, on issue joined. On the evidence adduced, all of which is set out in the bill of exceptions, the court charged the jury, that they must find for the plaintiff, if they believed the evidence; and this charge, to which the defendant excepted, is now assigned as error.

DESHON & LAY, for appellant.

L. H. FAITH, *contra*.

CLOPTON, J.—Chamberlain & Co. were garnisheed in a suit brought before a justice of the peace by Waganer against Hugh Fox and wife. By their answer, made March 22, 1884, they admitted having possession of the money, deposited with them to pay four "Seamen Advance Notes," which the plaintiff in the garnishment claimed belonged to the defendants; but they also alleged that they had been notified that appellee claimed title to the money. On March 24, process of garnishment was issued, at the instance of the plaintiff, against the appellee to appear on the next day, and answer as garnishee. The entry made by the justice is as follows: "The garnishee, J. Levinshon, appeared and answered no indebtedness, and also answered that he had no effects of the defendant in his possession, he claiming the aforesaid four notes and the money in

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the hands of Chamberlain & Co.” Two days thereafter, the plaintiff controverted the answer, and having taken issue on the claim, the justice found that the notes were the property of the defendant, Fox, and adjudged that the plaintiff Waganer “recover of the said Chamberlain & Co., and the said J. Levinshon, garnishees, the sum of one hundred dollars and the costs in this behalf accrued.” From this judgment the appellee took an appeal to the City Court, and on April 15, 1885, was discharged on his answer by order of the City Court. The appellant paid the judgment against Chamberlain & Co. before the present suit was brought, on being indemnified by Waganer, but at what particular time payment was made is not discovered. The payment of the judgment is set up as a defense to the present action, which was instituted April 18, 1885, by appellee against appellant, as surviving partner of Chamberlain & Co., to recover the money in their possession.

The proceedings before the justice abound with irregularities. These, however, are insufficient to invalidate the judgment on collateral impeachment, if the justice acquired jurisdiction of the subject-matter and the parties. But his jurisdiction being purely statutory, authority to render the judgment—the proceedings required by statute to enable the plaintiff in the garnishment to hold and appropriate the money in the hands of the garnishees to the payment of his debt as against the plaintiff in the present suit,—must appear.—*Gunn v. Howell*, 27 Ala. 663. When a garnishee alleges, by his answer, that he has been notified that another person claims title to, or an interest in, the debt or property, which he admits to be due or in his possession, the statute provides: “*The court must suspend proceedings against the garnishee, and cause a notice to issue to such person to appear at the next term of the court and contest with the plaintiff the right to the money or property.*” If he appear, he must be required to propound his claim in writing, and make oath thereto, upon which the plaintiff must take issue in law or in fact, and the issue in fact must be tried by a jury, if required by either party. If the issue be found for the plaintiff, judgment must be rendered against the garnishee on his answer; if for the contestant, the garnishee must be discharged. These provisions are applicable to proceedings before justices of the peace.—Code (1876), §§ 3221, 3302, 3303. The statute designs the protection of the garnishee against a double payment, and hence directs, that proceedings against him shall be suspended, and that notice shall issue to the claimant, by which he may be brought in, and his rights adjudicated in the same suit, whereby a judgment, conclusive on him, and protecting the garnishee, may be rendered. It operates to prohibit judgment against the garnishee, until an issue is

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formed between the plaintiff and the claimant, in the mode provided, and found in favor of the plaintiff. The duty devolves on the plaintiff to see that notice issues, and the court is bound to suspend further proceedings against the garnishee, and cause a notice to issue to the claimant to come and propound his claim.—*Wicks v. Br. B'k at Mobile*, 12 Ala. 594; *Security Loan Ass'n v. Weems*, 69 Ala. 584. Without the issue of such notice, the plaintiff in the garnishment, two days after the coming in of the answer of the garnishees, made affidavit, and thereon caused process of garnishment to be issued against the claimant. This course may well be regarded as a voluntary abandonment or discontinuance of the proceedings against the former garnishees, which entitled them to be discharged, and as an election to try Levinshon's right on an issue made up by controverting his answer as garnishee, instead of contesting his right to the *money* on a claim propounded in writing as provided by statute. Under these circumstances, the statute armed Chamberlain & Co. with power to protect themselves against an illegal and improper judgment, and if they submitted to a judgment, which the law did not authorize, its payment is no defense to a suit by the claimant.—*Pounds v. Hamner*, 59 Ala. 342. When the statute requires a particular proceeding as a condition precedent to judgment against the garnishee, and judgment is rendered without performance of the condition, its payment will be no protection, for it is in the power of the garnishee to resist judgment.—Drake on Attachment, § 711.

The judgment against Chamberlain & Co. is inoperative to protect them against a recovery in the present suit, unless, as averred in the special plea, the plaintiff voluntarily appeared and propounded his claim. We do not so read the entries of the justice, nor so interpret the evidence of the plaintiff when considered in connection therewith. He only appeared in obedience to the writ of garnishment, and answered as garnishee, claiming as such the notes and the money. His answer was controverted under the statute, and the only issue, which could have been made up related to the truth of the answer. The only judgment which could have been rendered on controverting the answer, was a judgment against, or discharging him, as *garnishee*. He was not in possession of the money, and his right to it is an incident of the ownership of the notes, which was without the issue; for the notes were not the subject of condemnation by garnishment.—*Levinshon v. Waganer*, 76 Ala. 412. We do not understand, that in the proceedings before the justice, any claim in writing was propounded by Levinshon, other than in his answer as garnishee, or that there was any contest as to his right to the money, except as inci-

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dental to his ownership of the notes, on controverting his answer. The only fact found by the justice was, that the notes were the property of Fox, and that they were past due; and thereupon, in consequence thereof, the justice rendered a joint judgment against Chamberlain & Co., and Levinshon, *garnishees*. On appeal from this judgment Levinshon was discharged as garnishee. There is, therefore, no judgment, to which he is a party, adjudicating his right to the notes or the money. Without taking steps to protect themselves, Chamberlain & Co. voluntarily paid the judgment against them on being indemnified. Such payment of such judgment is not a defense to the present suit.

Affirmed.

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Bill in Equity to establish Testamentary Paper as Contract, and enforce Trust on Property against Executor and Legatees under Will subsequently Executed and Probated.

1. *Testamentary paper executed on valuable consideration.*—A paper in the form of a will, executed in consideration of personal services rendered or to be rendered, or other valuable consideration, and delivered to the devisee or legatee therein named, may constitute an irrevocable contract.

2. *Same.*—Such a contract is not repugnant to public policy, but may be enforced, after the death of the promisor or testator, by action for a breach against his personal representative, or, in a proper case, by bill in equity against his heirs, devisees, or personal representative.

3. *Same; how enforced in equity.*—Such testamentary paper, when founded on valuable consideration, is in the nature of a covenant to stand seized to the use of the promisee; and it will be enforced in equity under a bill in the nature of specific performance, by fastening a trust upon the property in the hands of an executor, legatees and devisees, under a subsequent inconsistent will.

4. *Parties to bill.*—All the persons named in such testamentary paper as legatees, their rights differing only in extent or quantity, may unite as plaintiffs in a bill to enforce it.

5. *Probate of subsequent will, as defense to bill.*—The probate of the subsequent will, by the court having exclusive jurisdiction, though binding on the parties claiming under the former testamentary paper, is no defense to a bill which seeks to establish and enforce a trust on the property in their favor.

6. *Contracts of married woman having separate estate.*—A married woman, having a separate estate (which is presumed to be statutory, in the absence of averment and proof to the contrary), can not bind it or herself by a testamentary paper as an irrevocable contract, though she has power to execute a will.

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7. *Earnings and services of wife during coverture.*—The earnings and personal services of the wife, during coverture, presumptively belong to the husband, though he may relinquish them in her favor, except as against his existing creditors; and when the wife attempts to enforce in equity, after the death of the husband, a contract for her own benefit, the consideration of which was personal services rendered by her during coverture, she must allege and prove a relinquishment in her favor, and that the husband left no debts, or that his debts have been paid.

8. *Remedy at law.*—There is no adequate remedy at law, in favor of the persons named as legatees in such testamentary paper, on account of the failure of the promisor to carry out its provisions; and the jurisdiction of equity is maintainable on the grounds of fraud, trust, and specific performance.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed by Louisa Bolman and her married daughters, Caroline Kramer and Emma Pfeiffer, against Gibson Y. Overall, as the executor of Augusta Lohman, deceased, November 6th, 1886.

The averments of the bill sufficiently appear in the opinion of the court. A demurrer was interposed by the defendants, setting out a great number of grounds, among which were those numbered 5 and 15, which are in the following words, viz: "5. The bill shows that Louisa Bolman was a married woman at the time the services were rendered, and that since said time her husband, John Bolman, had died, hence it shows that whatever claims she had against Mrs. Augusta Lohman for services so rendered during coverture belong to the estate of John Bolman, her husband, and not to complainant Louisa Bolman or her daughters." "15. That the bill shows that Mrs. Lohman was a married woman at the time she made the contracts and agreements alleged in the bill, and that she still remained a married woman to the day of her death; hence said bill shows that Mrs. Lohman was not *sui juris*, and could not make a contract binding, or which can be enforced by law or in equity." The cause was submitted for decree upon demurrer, and on motion to dismiss for the want of equity. The chancellor decreed that there was no equity in complainants' bill, and sustained the demurrer, from which decree complainants appeal.

F. G. BROMBERG, for appellants.—The agreement of Mrs. Lohman to make a will in favor of the appellants was a valid and binding contract between the parties—citing: *Johnson v. Hubbell*, 10 N. J. Eq. 332; *Van Dayne v. Vresland*, 1 Beas. 147; *Davison v. Davison*, 13 N. J. Eq. 246; *Smith v. Smith*, 4 Dutch, 216; 5 Pick, 380; 95 N. Y. 575; 42 N. Y. 382;

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3 Pars. Con. 406; 7 Barr, 53; *Taylor v. Kelly*, 31 Ala. 59; *Eyre v. Potter*, 15 Hcw. 60; 66 Ala. 161.

OVERALL & BESTOR, *contra*.—Mrs. Lohman had the power to dispose of her property by will.—Code of Alabama, § 2713. She made at different times three different wills. The last will she made on the 16th day of April, 1883. “Exhibit C” to the bill, and this will was probated on the 5th day of November, 1886. This last will revoked the wills previously made.—Code, § 2297. Even the cancellation of a subsequent will, will not revive one previously made.—Code, § 2298. Wills are proved in the Probate Court.—Code, § 2304. The law provides the manner of their contestation in the Probate Court.—Code, §§ 2317, 2336. The jurisdiction of the Probate Court is full, complete and its action conclusive.—*Ikelheimer v. Chapman's Adm'r*, 32 Ala. 676, 681; *Gray's Adm'r. v. Cruise*, 39 Ala. 559; *Callart v. Allen*, 40 Ala. 155. Mrs. Bolman was, at the time the services were rendered, a married woman. If there was any claim for services rendered by the wife and children, it would belong to Mr. Bolman, or to his executor or administrator after his death.—*Evans, Fite, Porter & Co. v. Covington*, 70 Ala. 440; *Shaffer v. Sheppard*, 54 Alabama, 244; *Carleton v. Rivers*, 54 Ala. 467; *Gordon & Rankin v. Tweedy*, 71 Ala. 204.

On the hearing of the cause in the lower court, appellants' counsel mainly relied upon the question of specific performance of the contract claimed to have been made verbally and by the two prior wills. This is not such a contract as can be enforced under the principle of specific performance.—3 Parsons on Contracts, p. 406; *Stafford v. Bartholomew*, 2 Carter, Ind. 153. “The performance must be necessary. There must be a *valuable* consideration.”—Pomeroy on Contracts, note to § 36, p. 53.

“It is the fundamental principle that equity will not decree the specific execution of a contract unless the undertaking is founded on a *valuable* consideration moving from the party on whose behalf the performance is sought.”—Pomeroy on Contracts, § 57; *Irwin v. Bailey*, 72 Ala. 467; *Comer v. Bankhead*, 70 Ala. 493; *Moon v. Crowder*, 72 Ala. 80. But the allegations of the bill are not sufficient to establish such a lien or trust in lands.—*Carlisle v. Carlisle*, 77 Ala. 339; *Bailey v. Irwin*, 72 Ala. 505. Partial performance of an entire contract will not be decreed. Even if good as to the personal property, it can not be enforced as to the real estate, and hence not at all.—*Carlisle v. Carlisle*, 77 Ala. 339.

SOMERVILLE, J.—The appeal is from a decree of the

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chancellor sustaining a demurrer to the bill of complaint filed by the appellants for specific performance. The complainants are the legates under the will of one Augusta Lohman, which instrument purported to be executed in consideration of valuable services rendered to her in her lifetime by the complainants, and was executed on December first, 1881, and delivered to Mrs. Louisa Bolman, who was made executrix of the will, and residuary legatee therein, and is one of the complainants. In April 1883, the testator executed another will in which she sought to revoke the previous one, with all of the legacies made under its provisions, and leaving her entire property to other beneficiaries. This will was duly probated, the defendant Overall being the executor therein, and the other defendants legatees.

The bill, in the first place, alleges a verbal agreement made in March, 1876, between the complainant, Mrs. Bolman, and the deceased testator then living, by which it was agreed that the latter would leave to the complainants (Mrs. Bolman and her two daughters) all the property owned by her at her death, if they would come, and nurse her and take care of her, she being then sick in bed and in a helpless condition. The bill avers a faithful performance of the duties assumed by the complainants for over seven years—that from March 1876 to February, 1883, they either went to the testator's residence, or else had her in their own, and nursed her in sickness, cooked and washed for her, and attended to all her wants, until she declined further to receive their attentions, and left their home against their expressed dissent, several years before her death, which did not occur until October, 1886.

1. No doubt can be entertained as to the nature of the paper, executed by Mrs. Lohman on December first, 1881, and delivered by her to Mrs. Bolman, and purporting to be the testator's last will and testament. It is clearly a will in form, being testamentary in frame and verbiage. But it is also a contract, in essence and fact, being executed, as stated on the face of the paper, "in consideration of past and future treatment," and, as shown by the bill, in furtherance of a previous parol agreement that it should be executed upon an admitted and specified valuable consideration. Cases are frequent in which instruments have been construed to be partly testamentary and partly contractual. And when based on a valuable consideration, a paper, in form a will, may, especially when delivered to a party interested, or to another for him, constitute legally and in fact an irrevocable contract.—*Taylor v. Kelly*, 31 Ala. 59; *Kinnebrew v. Kinnebrew*, 55 Ala. 628; *Schouler on Wills*, §§ 452-455.

The purpose of the bill, as we construe it, is not to enforce

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the parol agreement, in which the deceased agreed to bequeath to complainants' all the property she might own at the time of her death, but rather to enforce the modified agreement as evidenced by the written instrument, purporting to be a will. No question can properly arise, therefore, as to the influence of the statute of frauds, in view of the fact that real estate is involved in the transaction. There are many well considered cases, however, in which parol agreements of this character, executed on the side of the promisee, have been enforced even in relation to land. But on these we have now no occasion to comment at any length.—*Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 279; *Shakespeare v. Markham*, 10 Hun. (N. Y.) 311.

2. There is nothing in this contract which is repugnant to public policy. All the authorities agree that one may, for a valuable consideration, renounce the absolute power to dispose of his estate at pleasure, and bind himself by contract to dispose of his property by will to a particular person, and that such contract may be enforced in the courts after his decease, either by an action for its breach against the personal representative, or, in a proper case, by bill in the nature of specific performance against his heirs, devisees, or personal representative. The validity of such agreements, as remarked by Mr. Freeman, in a recent note on this subject to the case of *Johnson v. Hubbell*, 10 N. J. Eq. Rep. (2 Stock.) 332; s. c., 66 Amer. Dec. 773, 784, "is supported by an unbroken current of authorities, both English and American."—*Wright v. Tinsley*, 30 Mo. 389; *Parsell v. Stryker*, 41 N. Y. 480. This principle does not embrace cases where services are rendered, or other valuable consideration parted with, in mere expectation of a legacy, and in reliance only on the testator's generosity. But there must be a contract, express or implied, stipulating for an agreed compensation by way of legacy or devise.—*Martin v. Wright*, 15 Wend. 460.

3. The principle upon which courts of equity undertake to enforce the execution of such agreements is referable to its jurisdiction over the subject of specific performance. It is not claimed, of course, that any court has the power to compel a person to execute a last will and testament carrying out his agreement to bequeath a legacy, for this can be done only in the lifetime of the testator, and no breach of the agreement can be assumed so long as he lives. And after his death, he is no longer capable of doing the thing agreed by him to be done. But the theory on which the courts proceed is to construe such an agreement, unless void under the statute of frauds or for other reason, to bind the property of the testator or intestate so far as to fasten a *trust* on it in favor of the promisee, and to enforce such trust against the heirs and per-

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sonal representatives of the deceased, or others holding under them charged with notice of the trust. It is in the nature of a covenant to stand seized to the use of the promisee, as if the promisor had agreed to retain a life estate in the property, with remainder to the promisee in the event the promisor owns it at the time of his death, but with full power on the part of the promisor to make any *bona fide* disposition of it during his life to another, otherwise than by will. The power to make such a will having been renounced, the attempt to exercise it is deemed a fraud on the rights of the promisee under the contract, thus bringing into exercise another ground of equity jurisdiction. As said by Lord Camden in *Dufoor v. Perran*, (quoted by Hargrave in his Judicial Arguments, Vol. 2, p. 310), there is no difference between one's promising to make a will in such a form, and making such will with a promise not to revoke it. The courts do not set aside the will in such cases, but the executor, heir, or devisee is made a trustee to perform the contract.—*Wright v. Tinsbey*, 30 Mo. 389; *Lord Walpole v. Lord Orford*, 3 Ves. 402; *Rivers v. Rivers* (4 Desaus 190), s. c. 4 Amer. Dec. 609; *Randall v. Willis*, 5 Ves. Jr. 262; *Johnson v. Hubbell*, 66 Amer. Dec. 773, 787; note and cases cited; 1 Story's Eq. Jur. (12th Ed.) §§ 785–786; *Taylor v. Mitchell*, 87 Penn. St. 518; *Logan v. McGinnis*, 12 Penn. St. 27; *Waterman on Spec. Per.* § 41; *Green v. Broyles*, (3 Humph. 167), s. c., 39 Amer. Dec. 156; *Schumaker v. Schmidt*, 44 Ala. 454. Mr. Schouler in his recent Treatise on Wills, § 454, lays down the rule, as deduced from the authorities, to be, that “where one contracts upon valuable consideration, to execute a will after a certain tenor, the agreement is binding upon his death, and may be specifically enforced against his personal representatives and his estate.” Mr. Parsons, after recognizing the validity and binding force of such agreements, and their incapability of literal specific performance, observes, in his work on contracts, that it has, nevertheless, “been held to be within the jurisdiction of equity to do what is equivalent to a specific performance of such an agreement, by requiring those upon whom the legal title has descended to convey the property in accordance with its terms.” “And,” he adds, “the court will not allow this *post mortem* remedy to be defeated by any devise, or conveyance in the lifetime inconsistent with the agreement.”—3 Parson's Contr. (7th Ed.) §§ 406–407. In *Waterman on Specific Performance*, § 41, it is said generally: “A person may make a valid agreement binding himself to dispose of his property in a particular way by last will and testament, and a court of equity will enforce such an agreement by compelling the heir at law to convey the property in accordance with the terms of the contract; but such a contract,

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especially when it is attempted to be established by parol, is regarded with suspicion, and not sustained except upon the strongest evidence that it was founded upon a valuable consideration, and deliberately entered into by the decedent."

Under all of the best considered authorities, we are of opinion, that the contract, evidenced by the will, is one which is capable of being enforced against the executor and legatees under Mrs. Lohman's last will, they being declared to be trustees of the executor's property for complainant's benefit, unless some good reason is shown to the contrary, other than any appearing in the statements of the bill.

4. The complainants are all legatees in the will and can clearly unite in the enforcement of their rights, which do not differ in nature or kind, but only in extent or quantity.

5. The fact that the last will of Mrs. Lohman has been probated by a court having exclusive jurisdiction of the probate of wills, and that this action of such court is conclusive on the complainants, and all others, is no answer to the purpose and prayer of the bill. No effort is made to disturb or set aside such probate, but to fasten a trust on the property, in the hands of the executor and legatees, who are admitted to hold the legal title to such property by virtue of the will, and its probate by the proper court.

6. One of the objections taken by demurrer to the bill is that Mrs. Lohman was a married woman at the time she made the alleged contract, and that for this reason it was not binding on her. This depends on the character of the separate estate held by her. If this was equitable, then she could bind it as if she were a *femme sole*, so that a trust could be fastened on, and made to follow it in the hands of the defendants, who are mere volunteers, and not purchasers for value. If, however, her estate be statutory, which must be assumed unless the contrary be alleged in the bill, Mrs. Lohman, being under coverture, labored under a disability to bind it by contract, or create a trust in it, in the manner attempted. It is true, that, under our statute married women may dispose of their separate estates by last will and testament. But this power can be exercised only in the manner specified, and can not be construed to confer the authority to make a contract fastening a trust on such estate—one which is tantamount in legal effect to a covenant to stand seized to the use of another. The incapacity of the wife to contract at common law would operate to render such a contract, which is executory in nature, void and of no effect. *Blythe v. Dargin*, 68 Ala. 370; *Waddell v. Weaver*, 42 Ala. 293; *Jenkins v. Harrison*, 66 Ala. 345.

The averments of the bill not being sufficiently certain to

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show that the estate of Mrs. Lohman was equitable, the *fifteenth* ground of demurrer to the bill was properly sustained.

7. So there was, in our judgment, no error in sustaining the *fifth* ground, which seems to have been well taken. Mrs. Bolman, one of the complainants, appears from the bill also to have been a married woman. The consideration paid by her for the legacy agreed to be left her was her personal services. Her services and earnings, presumptively, belonged to her husband. He being dead, the action would seem, therefore, to properly lie in the name of his personal representative and not in that of the wife. Upon the facts stated in the bill the executor would have no defense to another suit instituted by any creditor of the deceased husband who might hereafter obtain letters of administration on his estate. The husband, it is true, may relinquish such earnings to the wife, and such release would be valid except as to existing creditors; or, if fraudulently made, it might be subject to assailment also by his subsequent creditors. To make a good case for complainants the bill should have averred that the husband's estate had no creditors, or else that such debts were paid, and have also alleged facts showing a relinquishment by the husband, express or implied, of the wife's earnings to her.—*Pinkston v. McLemore*, 31 Ala. 398; *Roswald v. Wing*, 74 Ala. 346.

8. It is manifest that the complainants' remedy at law was not complete and adequate. It may be that they might have maintained an action against the executor for the value of the personal services rendered, or perhaps of the property agreed to be devised, as a claim against the estate of Mrs. Lohman, had she been *sui juris* when she made the contract. But being a married woman she could not bind herself personally, as we have before said, but could only bind her separate estate, provided it was equitable. Moreover, specific performance is peculiarly a branch of equity jurisdiction, especially in cases of this particular nature involving the matter of trust, and the prevention of fraud. "A court of equity will decree the specific performance of such an agreement, upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction."—*Parsell v. Stryker*, 41 N. Y. 48, 487; *Johnson v. Hubbell*, 10 N. J. Eq. Rep. 332, (s. c. 66 Amer. Rep. 773), *supra*.

The decree of the chancellor sustaining the demurrer to the bill is affirmed.

Haas v. Taylor.

Trover for Conversion of Cotton Seed.

1. *Plea of former judgment in bar; replication and evidence.*—In trover for the conversion of cotton seed, a former judgment being pleaded in bar, in which a set-off was claimed on account of the value of the cotton seed, it is competent for the plaintiff to show that, on the former trial, under the evidence and the rulings of the court thereon, the claim of set-off was disallowed, because the plaintiff in the action had an unsatisfied lien on the cotton seed; and a replication averring these facts is a good answer to the plea.

2. *Lien of bailee, and liability for negligence.*—The proprietor of a ginnery has a lien on cotton delivered to him to be ginned, for his services in ginning it, and is entitled to retain the possession until his charges are paid, but, if his lien has been discharged, and the property is not forthcoming on demand, the *onus* is on him to prove that it perished, was destroyed, lost or stolen, although he had exercised ordinary diligence in preserving it; and his liability extends equally to the acts of his agent in charge, or of a subsequent lessee of the ginnery.

3. *Demand and conversion.*—When the conversion complained of consists in a failure or refusal to deliver on demand, the demand must have been made after the plaintiff's right to the possession accrued; but, when the conversion consists of an unauthorized disposition, waste, or destruction of the property, no demand is necessary.

APPEAL from the Circuit Court of Montgomery.

Tried before Hon. JNO. P. HUBBARD.

This was an action of trover by Frank G. Taylor against J. C. Haas to recover damages for the alleged conversion of fifty bushels of cotton seed. On the trial, as shown by the record, the defendant pleaded the general issue and a special plea, averring, in substance: that in a former suit between the parties, in which Haas was plaintiff and Taylor defendant, and which was tried and determined at the December Term, 1884, of the Circuit Court of Montgomery county, before the Hon. JAMES E. COBB, the said Taylor, the defendant in that suit, "pleaded several pleas, and amongst them set-off, viz: that said Haas at the beginning of that suit was justly indebted to him, the said Taylor, to the amount of the proceeds of seventy-five bushels of cotton seed, valued at \$75.00, which, together with other matters and amounts said Taylor offered by said plea, to set off against the demands of said Haas, in said former suit, and claimed judgment over for the residue. * * And this defendant, the said J. C. Haas, avers that the fifty bushels of cotton seed mentioned and described in the complaint of the said Frank G. Taylor, in the present suit, and for

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the alleged conversion of which he claims damages of the said Haas, in this suit, are a part of the seventy-five bushels of cotton seed, valued at \$75.00, as aforesaid, which are mentioned in said plea of set-off, and which said Taylor offered to set off against the demands of said Haas in said former suit." The plea further averred that judgment was rendered in favor of said Haas in said former suit; and, after alleging the identity of the parties in the two suits, that the Circuit Court had jurisdiction, &c., "pleaded "said judgment in said former suit in bar to the present action."

It may be stated here that the said Haas was the proprietor of a "steam cotton mill or ginnery" in the city of Montgomery, and that the cotton seed in controversy were of a valuable grade or class, known as "Jower's seed," and reasonably worth \$1.00 per bushel, and were the product of certain cotton left with the defendant by the said Taylor, in September, 1883. The plaintiff, specially replying to defendant's plea of *res judicata*, after denying certain allegations in said plea, not necessary to be particularly noted, averred that "just before the matters involved in said former suit, in said Circuit Court, were submitted to the jury for their determination, the Hon. J. E. COBB, the judge presiding, instructed the said jury, that the said Haas, the plaintiff in said former suit, had a lien on the said seventy-five bushels of cotton seed claimed in said plea of set-off on account of his, the said Haas, having ginned the cotton out of which the said cotton seed came, and Taylor, not having paid the price for ginning the same, he, the said Taylor, plaintiff in this suit, but defendant in that suit, could not set off the value of said cotton seed until he had paid the costs of ginning the cotton out of which said seed came." The replication further alleged that "in the said judgment recovered by the said Haas against the plaintiff in said former suit, the value of said seventy-five bushels of cotton seed included in said plea of set-off, filed by the defendant in that suit, was not included or considered, but the amount claimed by the said Haas of the said Taylor, for ginning the said cotton out of which the said cotton seed came, was included; and the said Haas was thereby enabled to recover of the said Taylor the amount for the ginning of the said cotton out of which the said cotton seed came. And plaintiff in this suit further says, that he paid the judgment recovered by the said Haas of him in said former suit, before making the demand for the said seventy-five bushels of cotton seed." The said Taylor concluded said replication by averring that, after paying the judgment so recovered by said Haas, the latter gave him an order for the seventy-five bushels of cotton seed, directed to the party holding the same for said Haas; but, upon presentation of said order, he failed

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to get more than twenty-five bushels of the seed, and hence brought his action for the remaining fifty bushels. The court overruled a demurrer to the replication and the defendant duly excepted.

As shown by the bill of exceptions, the plaintiff introduced testimony as to the bailment with defendant of the cotton from which the seventy-five bushels of seed were derived; and to defendant's refusal to deliver the same, upon application therefor, upon the ground that he had a right to retain said seed, under a lien for ginning said cotton, until the price charged by him for such ginning was paid. "The plaintiff offered to prove by a colored witness, Sam Bostwick, that one Weil was the agent of defendant, in charge of said gin or mill, superintending and managing the same. Defendant objected to the introduction of this evidence, but the court overruled defendant's objection, and allowed the witness to testify that said Weil was the agent of defendant; that he had charge of the gin and warehouse connected therewith; that he bought cotton seed; saw to the receipt of cotton to be ginned there, and to the delivery of the same when it had been ginned; and that he seemed to have general charge and management of the entire business. * * Plaintiff offered to prove by said witness, Bostwick, that in the early part of the year, 1884, on a cold, frosty morning, 'said Weil sold one bushel of said cotton seed to a countryman' for \$5.00. It being admitted that defendant was not present at the time, defendant thereupon objected to the evidence, but the court overruled his objection and allowed the witness to so testify, and to this refusal of the court defendant duly excepted." This witness also testified that, some time in the Fall of the year, 1883, the said Weil ordered a hamper basket and two sacks of said seed to be carried to the house of defendant, and that said seed were put on a dray by witness and said dray went up "town," and towards defendant's house; but the witness was "unable to state whether said basket and sacks of seed were ever, in fact, carried to or delivered at said defendant's house. It being admitted that defendant was not present at the time, defendant thereupon objected to the introduction of this evidence, or any part thereof, to the jury; but the court overruled the defendant's objection, and allowed the witness to testify to said facts, and to this action and ruling of the court defendant duly excepted." The plaintiff, as a witness in his own behalf, testified as to the recovery against him in the suit of *Haas v. Taylor*, and that he had paid the judgment therein; that he received an order from said Haas, directed to Chambers Bros. who occupied and operated the warehouse, where said cotton seed was stored, but he "found only twenty-five bushels, which were so badly rotted

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that he had to throw them in a manure pile;" that shortly thereafter he brought the present suit, first notifying Haas that he had only received from Chambers Bros. 25 bushels, leaving 50 bushels due him.

As further shown by the bill of exceptions, the defendant testified "that he had never authorized said Weil, at any time, while he was in defendant's employment, to sell either cotton or cotton seed at the mill, in the warehouse, or elsewhere;" and denied most of the essential facts testified to by the witness, Bostwick, as to the alleged conversion of the seed in question. Thos. H. Watts, Jr. then testified as a witness for the plaintiff, as to the proceedings in the suit of *Haas v. Taylor*; his testimony, to portions of which exceptions were duly reserved by the defendant, tending to support the allegations of the replication filed by the said Taylor, the defendant in the former suit, and the plaintiff in the present action.

This being substantially all the evidence, the plaintiff requested the following charge which was in writing: "(1.) The defendant, although he had a lien on the cotton seed sued for, was bound to take reasonable care of the cotton seed; and if he sets up as defense that the seed were stolen, or that some one else got them, the burden of proving these facts is on the defendant, and he must prove them to the satisfaction of the jury." To the giving of this charge the defendant excepted, and requested the following, which were in writing: "(1.) If the jury believe all the evidence in this case, they must find for the defendant. (2.) If the jury believe from the evidence that on the 1st day of October, 1883, the cotton seed in controversy were in possession of the defendant, Haas, and that Haas retained possession thereof under a lien for ginning cotton for Taylor, out of which cotton the seed in question were derived; that while said seed were thus held by said Haas, Taylor on said 1st day of October, 1883, demanded said seed of Haas, and that Haas thereupon refused to deliver or surrender said seed to Taylor, upon the ground that he had a lien for ginning against Taylor, which had not been paid off or discharged; and if the jury further find from the evidence that Haas held said lien thereon, which Taylor at that time had not discharged or paid off, then, upon this state of facts, if believed by the jury, the plaintiff is not entitled to recover in this suit. (3.) Unless the jury are satisfied from the evidence that the plaintiff had the possession, or immediate right of possession to the cotton seed in controversy, on the 1st day of October, 1883, then the plaintiff can not recover in this action; and in determining the fact, whether or not plaintiff had the possession, or immediate right of possession to said seed, they must look to the fact that Haas had possession of said seed, holding the same until a lien

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for ginning was paid off, if the jury believe this fact. (4.) If the jury believe from the evidence that on or about October 1st, 1883, Taylor demanded the cotton seed from Haas, and that Haas refused to deliver them upon the ground that Taylor was indebted to him for ginning and held a lien thereon therefor, and declined to deliver the seed until the lien was paid off and discharged, then, upon this state of facts, if believed by the jury, said Haas had a right to refuse to deliver up the seed, and to hold the same until the said lien was discharged, and if the jury believe from the evidence, that said demand and refusal were the only demand and refusal at or before the time of the conversion alleged in the complaint, then the plaintiff is not entitled to recover."

The assignments of error embrace the refusal of the court to give these charges, and the rulings above noted, to which exceptions were reserved by the appellant.

RICE & WILEY, for appellant.

WATTS & SON, *contra*.

STONE, C. J.—The general rule is, that an issue formed before a court having jurisdiction of the subject-matter and parties, and decided by such court on the merits, is, so long as the decision remains unreversed, a conclusive determination of the controversy or title involved between the parties to the suit, and their privies in blood or estate. And such former determination may be pleaded in bar, or, in many cases, proved on the trial, without special pleading. It is a bar, not alone as to the matters directly presented on the face of the record. It goes further, and determines every inquiry necessarily involved in the issue as formed and decided. And any connected attendant fact, circumstance, or condition which limits, qualifies, or varies the fact in issue, is as effectually determined by it, as is the main fact itself. To come within the rule, however, the issue must be broad enough to embrace the subject, it must have been in fact considered, or so blended with the subject considered as to have become a qualifying part of it, and it must have been decided on the merits. Mr. Freeman, in his work on Judgments, § 256, speaking of what is necessary to constitute the bar, says the essentials are, "1st, that the issue in the second action, upon which the judgment is brought to bear, was a material issue in the first action, necessarily determined by the judgment therein; 2d, that the former judgment was upon the merits."—See also 2 Smith Lead Cas. (8th ed.) 919, *et seq.*

The foregoing definition does not bring within the operation
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of the estoppel, matters, not of the essence of the contention, but brought incidentally, or collaterally into it, in the wide range frequently indulged, in the introduction of testimony. Nor, as it is sometimes said, does it include matters which require argument to bring them within the influence of the decision. It is only of those matters which, as premisses, enter into and uphold the judgment (the judgment being the conclusion of the syllogism), and *connected, qualifying matters*, which, if produced, would change or impair the legal force and effect of the cause of action itself on which the judgment was rendered, that the judgment pronounced becomes conclusive. There is the further qualification. If there be a disconnected, independent claim, which the law allows to be introduced—a valid cross-demand, for instance—and such claim is brought into the contention, considered, and adjudicated upon its merits, this becomes *res judicata*, and parties and their privies are estopped from re-litigating the validity of such claim.—*S. & N. Ala. R. Co. v. Henlein*, 56 Ala. 268.

In making good the defense of *res judicata*, the evidence must necessarily vary with the nature of the issues presented in the first trial. Sometimes the record makes full proof of the subject-matter both of the suit and the defense, as it does of the judgment pronounced. In others, the identity and scope of the contestation do not appear on the face of the papers. When such is the case, other sources of information must be resorted to. If necessary, it is permissible to prove what testimony was given on the former trial, and the rulings of the court, as a means, and the only means of showing precisely what issues and inquiries of fact had been submitted to the trying body. This, with the view, and solely with the view, of determining the identity of the two contentions.

On a second trial, it can never become an inquiry whether the first issue was rightly determined, either in matters of law, or of fact. Whether the issue was within the scope of the pleadings, whether it was the same as that on trial, and whether it was submitted and determined on its merits, are the subject and extent of permissible testimony on the defense of *res judicata*. Perhaps these rules are so well defined that we need not have repeated them.—*Robinson v. Windham*, 9 Por. 397; *Davidson v. Shipman*, 6 Ala. 27; *Chamberlain v. Gaillard*, 26 Ala. 504; *Waring v. Lewis*, 53 Ala. 615; *Perkins v. Moore*, 16 Ala. 9; *Gilbreath v. Jones*, 66 Ala. 129; *McCall v. Jones*, 72 Ala. 369; *Hanchey v. Croskrey*, 1 So. Rep. 259, s. c. 80 Ala.; *Rakes v. Pope*, 7 Ala. 161; 1 Greenl. Ev. §§ 528–30, 532.

We do not propose to discuss other features of the doctrine
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of *res judicata*, as they are not pertinent to any material question in this cause.

Tested by the rules stated above, the Circuit Court did not err in admitting testimony of what witnesses had testified to on the trial of *Haas v. Taylor*, the judgment in which case is pleaded as *res judicata* to the present action. Neither was there error in allowing proof of the rulings of the presiding judge on the former trial, that the set-off of the cotton seed, pleaded as a defense to that suit, was not a legal cross-demand. The value of the cotton seed claimed as set-off in that suit, is the identical cause of action on which the present suit is founded, and the effect of that ruling was to exclude from the consideration of the jury that item of defense. The ruling was clearly correct, for at that time Taylor could maintain no action for the recovery of the cotton seed or their value. Haas had an unsatisfied lien on them, and could maintain his right to the possession until his lien was satisfied.

The right to the cotton seed or their value, was not determined on its merits in the former suit, as all the testimony tends to prove. The replication was sufficient, and the demurrer to it was rightly overruled.

Haas having a lien on the cotton seed to secure his proper charges for the ginning, was authorized to retain the possession of them until such charge was paid. This the testimony showed he did. Having such possession, it was his duty to bestow ordinary care and diligence in their preservation. The measure is, such care and diligence as an ordinarily prudent person takes of his own similar property. And if on demand of the property, the lien being discharged, it is not forth-coming, the burden is on the possessor, or donee, to show that it perished, was destroyed, was lost, or stolen, notwithstanding he had employed ordinary diligence in preserving it. He is not relieved of imputed fault, until he shows the exercise of this measure of diligence, unless the loss or destruction is shown to have occurred under circumstances which ordinary diligence could not have foreseen nor prevented.—Jones on Pledges, §§ 403, *et seq.*

There was proof that the ginney or mill, while owned and operated by Haas, was nevertheless in the care and control of Weil, his agent. And there was testimony that while so in possession, Weil sold one hundred bushels of seed, and sent off another portion. This testimony was objected to by Haas, the defendant. There was nothing in this objection. Haas, as we have seen, was bound to use ordinary diligence in taking care of the cotton seed, and fastened a liability on himself for any damages done to Taylor for his failure to bestow it. And Weil, being in possession and control as his agent, he was equally responsible for his negligence and unauthorized disposition of the

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seed, as if he, Haas, had himself perpetrated the wrong. It was a breach of his duty to safely keep, and to use ordinary diligence in preserving the cotton seed, for Taylor's use. So, it is immaterial where the cotton seed went, when sent off by Weil. It was, a breach of duty which, under the law, rested on Haas, for which the latter is reponsible.

And this duty to preserve the cotton seed continued and would continue, until Haas disposed of them properly in discharge of his lien, or restored them to Taylor. Hence, when the possession of the mill or ginnery passed from him to Chambers Bros., the duty did not cease. He should have employed proper diligence for their continued preservation, the same as an ordinarily prudent man would bestow for the safe keeping of his own property of like kind.

It is very true that when the conversion complained of consists in a failure or refusal to deliver on demand, such demand to be effective, must be made after the plaintiff's right to the possession has accrued. The conversion complained of in this case is different. Unauthorized disposition, waste, or destruction of the property, or a part of it, is what the testimony tends to prove. When such is the case, no demand is necessary. *Glaze v. McMillan*, 7 Por. 279; *Brown v. Beason*, 24 Ala. 466; *Kyle v. Gray*, 11 Ala. 233; 6 Wait Ac. & Def. 165.

The tendency of the testimony, if believed, was to show that part of the cotton seed were sold, or otherwise disposed of by Weil, the agent in charge. The proof does not explain what became of the other missing seed. Possibly they were lost through the carelessness, or inattention of the persons in charge. If so, it might become a question whether trover would lie for the seed thus lost. We refer to this phase of the case, for the sole purpose of preventing a misinterpretation of our ruling. As we have shown, there was testimony tending to prove a conversion of a part of the seed; and if there was other part for which, according to strict rules, trover would not lie, that presented a question, not of right, but of the measure of recovery. This could only be raised by a proper charge, and the record fails to show that any such charge was asked or given. The question is not raised, and we intimate no opinion on it.

The Circuit Court did not err in the charges given, nor in the refusal of the charges asked.

Affirmed.

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Action on Policy of Life Insurance.

1. *Insurance; warranty and representations distinguished.*—In a contract of insurance, a warranty is part and parcel of the contract itself, is in the nature of a condition precedent, and, whether material to the risk or not, must be strictly complied with, or literally fulfilled, before the assured can recover on the policy; while a representation, not being of the essence of the contract, but relating to something collateral or preliminary, and in the nature of an inducement to it, though false, does not avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by the agreement of the parties.

2. *Same.*—The mere fact that a statement is referred to, or even inserted in the policy itself, is not now considered conclusive of its nature as a warranty; but whether it is to be construed as a warranty, or as a representation merely, depends rather on the form of the expression, the apparent purpose of its insertion, and its conviction with other parts of the application and policy, construed together as one entire contract.

3. *General rules of construction.*—Among the settled rules for the construction of policies of insurance are these: (1) that all the conditions and obligations of the contract will be construed liberally in favor of the assured, and strictly against the insurer, (2) that the clearest and most unequivocal language is necessary to create a warranty, and all statements of doubtful meaning will be construed as representations merely; (3) that even though a warranty in name or form be declared by the terms of the contract, its effect may be modified by other parts of the policy, or of the application, including the questions and answers, so that answers to questions not material to the risk will be construed as warranting only their honesty and good faith.

4. *Case at bar.*—In this case, the contract containing inconsistent expressions, one part tending to show an intention to make the answer warranties, and another treating them as representations merely, the court holds (1) that the answers are not absolute warranties, but are in the nature of representations, or, if warranties, only of an honest belief of their truth; (2) that any untrue statement or suppression of fact material to the risk will vitiate the policy, and thus bar a recovery, whether intentional or within the knowledge of the party or not; (3) that such statement of an immaterial fact, though untrue, will not avoid the policy, unless the party knew it was false, or was negligently ignorant; and (4) that the inquiries as to the symptoms of disease were not intended to be absolutely material, unless they had existed in such appreciable form as would affect soundness of health, or have a tendency to shorten life.

APPEAL from the Circuit Court of Mobile.

Tried before Hon. W. E. CLARKE.

This action was brought against the appellant, a domestic corporation, on 31st October, 1884, by William F. Johnston,

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administrator of the estate of Dora E. Connor, and guardian of William T. and Walter M. Connor, minor children of William D. Connor, deceased: and was founded on a policy of life insurance which the said W. D. Connor effected with appellant corporation for the benefit of said Dora E. and her children on 3d December, 1872. The complaint avers the fact of insurance, and the death of the assured, which occurred in December, 1883, and that satisfactory proof thereof was duly transmitted to the defendant and payment of the amount of the policy demanded and refused.

On the trial, as shown by the record, the defendant pleaded the general issue, and a number of special pleas based upon the alleged untruthfulness of certain answers given by the assured to questions contained in the printed "application," or proposal for insurance, submitted by said Connor prior to the issuance to him of the policy in question. This application, which was introduced in evidence contained under the heading or caption of "Particulars required from persons proposing to effect Insurance on Lives in the Company, and forming the basis of the contract," a list of questions designed to elicit information from the applicant for insurance touching his past and present physical condition. Among the questions in this application or proposal pertinent to this report were the following: "(10) Is the party subject or predisposed to dyspepsia, dysentery, diarrhoea, *or any other disease or bodily infirmity?*" To this question the said Connor answered "No." "(11) Has the party had, or been affected, *since childhood*, with any of the following complaints," enumerating various ailments or diseases, among which was the following: "*Fits or convulsions?*" To this question the said Connor responded in the negative. The application also exhibits the following question and answer: "(32) Is the party aware that any untrue or fraudulent answers to the above queries, or any suppression of the facts in regard to the party's health will vitiate the policy, and forfeit all payment made thereon?" "Yes." In addition to the questions and answers, the said application contained a "declaration" of the beneficiaries in the following language: "We do hereby declare, that the age of W. D. Connor, the above named, does not now exceed 33 years; that he is now in good health, and does ordinarily enjoy good health, and that in the above proposal we have not withheld any material circumstance, or information touching the past or present state of health or habits of life of W. D. Connor, with which the officers and Directors of the Alabama Gold Life Insurance Company should be made acquainted."

The defendant filed special pleas in reference to each of the foregoing answers averring (except the last), substantially, that

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the assured "had fits" or convulsions when he was of the age of seventeen or eighteen years;" and that said answers, being severally untrue, constituted breaches of the contract of insurance as being violative of the following stipulation embodied in the policy: "*And it is also understood and agreed, by the within assured, to be the true intent and meaning hereof, that if the declaration, or any part thereof, made by or for the said insured, in the application for this policy, and bearing date the third day of December, 1872, and upon the faith of which this policy is made, shall be found, in any respect untrue, then, and in such case, this policy shall be null and void.*" The defendant adduced medical and other testimony which tended to establish the allegations of the special pleas that the said Connor was, (from his eighteenth to his twentieth year) subject to a disorder styled by the various witnesses as "Fits," "Convulsions," "Spasms," etc. A number of plaintiffs' witnesses, however, testified that the assured had not been so affected "since he was grown;" and their evidence tended to fix the period during which said Connor was subject to said complaint, somewhat earlier than that indicated by the defendant's testimony. There was no recurrence of the Fits or Convulsions after said Connor was "grown;" and it was shown that his general health was unusually good until his death, in December, 1883, of an abscess resulting from typhoid fever.

This being the substance of the evidence, the court, as shown by the Bill of Exceptions, charged the jury, amongst other things, "that the insurance contract, as evidenced by the application and policy, did not amount to a warranty of the truth of the answers made by the assured to the questions in the application, but were merely representations," to which charge the defendant duly excepted. The court further charged the jury that "it was a question for them to decide, whether the fits and convulsions, which the assured had since childhood were material to the risk, and whether or not the defendant would have issued the policy if the assured had answered that he had had fits and convulsions, as the proof indicated." To this charge the defendant also excepted. The court also charged the jury, in connection with the portion of the general charge above set out, that "although the statements made in the application were not, by the contract of insurance warranted to be true, still if the assured, at the time that the application was made, answered any question, as to any matter material to the risk, knowing that such answer was false, or having the means of ascertaining that it was false, the policy would be void, and no recovery could be had by the plaintiff. That the fact that, any questions were asked of the assured in the application made the matter inquired about material to the

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risk, and that if the jury found that a false answer had been given to any question asked in the application, which was at the time known to the assured to be false, or concerning which the assured had the means of ascertaining that it was false, the plaintiff could not recover. That if the deceased knew he had fits or convulsions after he was fourteen years of age, or had knowledge of facts that, if followed up, would have brought him to that knowledge, the plaintiff could not recover."

The defendant requested the following charge in writing, and excepted to its refusal by the court: "If the jury believe the evidence, they must find for the defendant." The charges above noted to which exceptions were reserved by the defendant, and the refusal to give the general charge, are here assigned as error.

OVERALL & BESTOR, for appellant.

J. L. & G. L. SMITH, and Wm. F. JOHNSTON, *contra*.

SOMERVILLE, J.—The question of most importance, which is raised by the rulings of the court in this case, is, whether the answers made by the assured to the questions contained in the application for insurance are to be construed as absolute *warranties*, or in the nature of mere *representations*.

The distinction between a warranty and a representation in insurance is frequently a question of difficulty, especially in the light of more recent decisions, which recognize the subject as one of growing importance in its relations particularly to life insurance. As a general rule it has been laid down, that a warranty must be a part and parcel of the contract of insurance, so as to appear, as it were, upon the face of the policy itself, and is in the nature of a condition precedent. It may be affirmative of some fact, or only promissory. It must be strictly complied with, or literally fulfilled, before the assured is entitled to recover on the policy. It need not be material to the risk, for whether material or not, its falsity or untruth will bar the assured of any recovery on the contract, because the warranty itself is an implied stipulation that the thing warranted is material. It further differs from a representation in creating on the part of the assured an absolute liability whether made in good faith or not.

A representation is not, strictly speaking, a part of the contract of insurance, or of the essence of it, but rather something collateral or preliminary, and in the nature of an inducement to it. A false representation, unlike a false warranty, will not operate to vitiate the contract, or avoid the policy, unless it relates to a fact actually material, or clearly intended to be

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made material by the agreement of the parties. It is sufficient if representations be substantially true. They need not be strictly, or literally so. A misrepresentation renders the policy void on the ground of *fraud*; while a non-compliance with a warranty operates as an express *breach* of the contract.

The mere fact that a statement is referred to, or even inserted in the policy itself, so as to appear on its face, is not alone now considered as conclusive of its nature as a warranty, although it was formerly considered otherwise. Whether such statement, shall be construed as a warranty or a representation depends rather upon the form of expression used, the apparent purpose of the insertion, and its connection or relation to other parts of the application and policy, construed together as a whole, where legally these papers constitute one entire contract, as they most frequently do. Bliss on Insurance, § 43 *et seq.*, *Price v. Phoenix Mut. Ins. Co.*, (17 Minn. 497), S. C. 10 Amer. Rep.

In construing contracts of insurance there are some settled rules of construction, bearing on this subject, which we may briefly formulate as follows:

(1). The courts being strongly inclined against forfeitures, will construe all the conditions of the contract, and the obligations imposed, liberally in favor of the assured, and strictly against the insurer.

(2). It requires the clearest and most unequivocal language to create a warranty, and every statement or engagement of the assured will be construed to be a representation and not a warranty, if it be at all doubtful in meaning, or the contract contains contradictory provisions relating to the subject, or be otherwise reasonably susceptible of such construction. The court, in other words, will lean against that construction of the contract which will impose upon the assured the burdens of a warranty, and will neither create nor extend a warranty by construction.

(3). Even though a warranty, in name or form, be created by the terms of the contract, its effect may be modified by other parts of the policy, or of the application, including the questions and answers, so that the answers of the assured, so often merely categorical, will be construed not to be a warranty of immaterial facts, stated in such answers, but rather a warranty of the assured's honest belief in their truth—or, in other words, that they were stated in good faith. The strong inclination of the courts is thus to make these statements, or answers, binding only so far as they are material to the risk, where this can be done without doing violence to the clear intention of the parties expressed in unequivocal and unqualified language to the contrary.

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In support of these deductions we need not do more than refer to the following authorities: *Moulton v. American Life Ins. Co.*, 111 U. S. 335; *National Bank v. Insurance Co.*, 95 U. S. 673; *Price v. Phoenix Mut. Life Ins. Co.*, 10 Amer. Rep. 166; *supra*; *Southern Life Ins. Co. v. Booker*, (9 Heisk. 606), s. c. 24 Amer. Rep. 344; *Fitch v. The American, etc., Ins. Co.* (59 N. Y. 557), s. c. 17 Amer. Rep. 372; Bliss on Ins., § 24; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Fowler v. Aetna Fire Ins. Co.*, 16 Amer. Dec., note, pp. 463-466; *Piedmont, etc., Ins. Co. v. Young*, 58 Ala. 476; 2 Parsons on Contr. *465 *et seq.*; *Glendale Woolen Co. v. Protection Ins. Co.*, 54 Amer. Dec. 309, 320; *Wilkinson v. The Connecticut Mut. Life Ins. Co.* (30 Iowa 119), s. c., 6 Amer. Rep. 637; 1 Billups on Ins., § 638; Angell on Fire & Life Ins. Co., §§ 147, 147a.

Many early adjudications may be found, and not a few recent ones also, in which contracts of insurance, and especially of life insurance, have been construed in such a manner as to operate with great harshness and injustice to policy holders, who, acting with all proper prudence, as remarked by Lord St. Leonards, in the case of *Anderson v. Fitzgerald*, 4 H. L. C. 507, (s. c., 24 Eng. L. & Eq. 1), had been "led to suppose that they had made a provision for their families by an insurance on their lives, when, in point of fact, the policy was not worth the paper on which it is written." The rapid growth of the business of life insurance in the past quarter of a century, with the tendency of insurers to exact increasingly rigid and technical conditions, and the evils resulting from an abuse of the whole system, justify, if they do not necessitate, a departure from the rigidity of our earlier jurisprudence on this subject of warranties. And such, as we have said, is the tendency of the more modern authorities.

There are, it is true, in this case, some expressions in both the policy and the application, (which, taken together, constitute the contract of insurance), that indicate an intention to make all statements by the assured absolute warranties. The application, consisting of a "proposal" and a "declaration," is declared to "form the basis of the contract" of insurance, and the policy is asserted to have been issued "on the faith" of the application. It is further provided, that if the declaration, or any part of it, made by the assured, shall be found "in any respect untrue," or "any untrue or fraudulent answers" are made to the questions propounded, or facts suppressed, the policy shall be vitiated, and all payments of premiums made thereon shall be forfeited. So, if there were nothing in the contract to rebut the implication, it might perhaps be held that the parties had made each answer of the assured material

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to the risk by the mere fact of propounding the questions to which such answers were made, and that this precluded all inquiry into the question of materiality.—*Price v. Phoenix Mut. Life Ins. Co.*, 10 Amer. Rep. 166, *supra*.

On the contrary, the policy purports to be issued "in consideration of the *representations*" made in the application, and of the annual premiums. The answers are no where expressly declared to be warranties, nor is the application, in so many words, made a part of the contract, so as to clearly import the answers into the terms and conditions of the policy. Among numerous other questions, the assured was asked whether he had been affected since childhood with any one of an enumerated list of complaints or diseases, including "fits or convulsions;" and whether he had "ever been seriously ill," or had been affected with "any serious disease." To each of these questions he answered "No." The concluding question is as follows: "32. Is the party aware that any *untrue* or *fraudulent* answers to the above queries, or any *suppression of the facts* in regard to the party's health will vitiate the policy, and forfeit all payments made thereon?" To this was given the answer, "Yes." It is significant, as observed in a recent case before the New York Court of Appeals, that the assured "is not asked whether he is aware that any unintentional mistake in answering any of the host of questions thrust at him, whether material to the risk or not, will be a breach of warranty, and vitiate his policy." *Fitch v. The American etc. Insurance Co.* (59 N. Y. 557), s. c., 17 Amer. Rep. 372, *supra*. Then follows a declaration that "the assured is now in good health, and does ordinarily enjoy good health," and that in the proposal of insurance he "had not withheld any *material* circumstance or information touching the past or present state of health or habits of life" of the assured, with which the company "should be made acquainted."

One part of the contract thus tends to show an intention to constitute the answers warranties, while the other describes and treats them as representations. There is thus left ample room for construction. What is to be understood by "untrue" answers, or "any *suppression of facts*?" Can they have reference to any disease, with which the assured was alleged to have been afflicted, of which he knew nothing, and could not possibly have informed himself by the exercise of proper diligence? Are they intended as absolute warranties of the fact that he had never, since childhood, or during life, been afflicted with diseases of which neither he, nor the most skillful physician could have had any knowledge whatever? The case of *Moulton v. American Life Ins. Co.* III U. S. 335, is a direct and strong authority for the position that the word "untrue" in the above

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connection, in its broader sense, means knowingly or designedly untrue, or recklessly so—that it is the opposite of sincere, honest, not fraudulent. As said in that case, it is reasonably clear that “what the company required of the applicant, as a condition precedent to any binding contract, was, that he would observe the utmost faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts, with which the company ought to be made acquainted; and that by doing so, and only by doing so, would be deemed to have made fair and true answers.”

The case of *Southern Life Insurance Co. v. Booker* (9 Heisk. 606), s. c., 24 Amer. Rep. 344, sustained the same view. There the policy, as here, was conditioned to be avoided by “any untrue or fraudulent answer” to the questions in the application. The answers were not strictly true as to the birthplace, residence and occupation of the assured. It was held that none of these being material to the risk, they would be construed as representations, although expressly declared to be “the basis of the contract” of insurance. The court said: “It would seem to be gross injustice to allow this (meaning the avoidance of the policy and the forfeiture of all payments made under it), in a case where the insured has acted in the utmost good faith, and honestly disclosed every fact material to be known, because, merely by inadvertence or oversight, an error of fact has been inserted in his application—an error that is clearly immaterial, and that could not by possibility have affected the contract. It is true that the parties have a right,” the court adds, “to make their own contract, and by its terms we must be governed; but before a court could hold a policy void, and all premiums paid thereon forfeited, because statements of this character in the application turned out to be untrue, they should be fully satisfied that such terms were fully and distinctly agreed to by the parties.” These views, in our judgment, announce the sounder and more just doctrine, and they meet with our approval, being supported by reason, as well as by the more recent decisions of this country, on the subject of life insurance.—3 Addison Contr. (Morgan’s Ed.) § 1123; *Price v. Phoenix etc. Ins. Co.*, 10 Amer. Rep. 166, 174; *supra*; *Fitch v. The American etc. Ins. Co.* 17 Amer. Rep. 372, *supra*.

So the declaration embodied in the application, would seem to indicate that it is the inadvertent suppression or statement only of *material* circumstances or information, with which the company should in good faith be made acquainted, that will vitiate the policy, and cause a forfeiture. It cannot be supposed that one who, for the purpose of procuring insurance,

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alleges himself to be in good health, shall be understood as warranting himself to be in perfect and absolute health, for this is seldom, if ever, the fortune of any human being, and "we are all born," as said by Lord Mansfield in *Willis v. Poole*, Park. Ins. 555, "with the seeds of mortality in us." These inquiries as to symptoms of diseases, as said by Mr. Parsons, therefore must mean, whether they "have ever appeared in such a way, or under such circumstances, as to indicate a disease which would have a tendency to shorten life," and he adds, "it is with this meaning the question is left to the jury."—2 Parsons Contr. *468, 471; 3 Addison Contr. (Morgan's ed.), § 1233. It has accordingly been held in an English case, cited and approved both by Mr. Parsons and Mr. Addison, that even a warranty that the party, whose life is insured, "has not been afflicted with, nor is subject to vertigo, fits, etc.," would not be falsified by having had one fit. To forfeit the policy on this ground he must have been habitually or constitutionally afflicted with fits. Even then, adds Mr. Parsons, "we apprehend the materiality of the fact would be taken into consideration; that is, for example, the policy would not be defeated by proof that the life insured, long years before, and when a teething child, had a fit."—2 Parsons Contr. *471-472; *Insurance Co. v. Wilkinson*, 13 Wall; 222.

There is nothing decided in *Alabama Gold Life Ins. Co. v. Garner*, 77 Ala. 210, or in *Alabama Gold Life Ins. Co. v. Thomas*, 74 Ala. 578, which conflicts with the foregoing views. The cases of *Jeffries v. Life Ins. Co.* 22 Wall. 47, and *Ætna Life Ins. Co. v. France Ins. Co.*, 91 U. S. 410, are distinguished, if not modified, in the later case of *Moulor v. Amer. Life Ins. Co.*, 111 U. S. 342, *supra*.

Our conclusion is that the following is a just and fair construction of the contract of insurance under consideration :

(1). That the answers of the assured were not absolute warranties, but in the nature of representations; or if warranties, they are so modified by other parts of the contract as to be warranties only of an honest belief of their truth.

(2). That any untrue statement or suppression of fact, *material* to the risk assured, will vitiate the policy, and thus bar a recovery, whether intentional, or within the knowledge of the assured, or not.

(3). If *immaterial*, such statement, to avoid the policy, must have been untrue within the knowledge of the assured—that is, he must either have known it, or have been negligently ignorant of it.

(4). The terms of the contract rebut the implication that all symptoms of diseases inquired about were intended to be made absolutely material, unless they had once existed in such appre-

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cialable form as would affect soundness of health, or have a tendency to shorten life, and thus affect the risk.

It is very obvious that the rulings of the Circuit Court conformed to these principles, and, for this reason, we are of opinion that they are free from error. The evidence was sufficiently conflicting in its tendencies to justify the refusal to give the general charge requested by the defendant. The judgment is therefore affirmed.

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Action for Money Had and Received.

1. *Advances to make crop ; what articles are within statute.*—Fertilizers not being among the articles specially mentioned in the statute (Code, § 3286), a written instrument executed in consideration of a horse advanced or sold on credit, which declares that, without such advances, it would not be within the power of the maker to procure the necessary “teams, provisions, farming implements and fertilizers to make a crop,” does not create a statutory lien, though it may have effect as a mortgage.

2. *When action lies for money had and received.*—An action for money had and received is an equitable remedy, and lies whenever the defendant has received money which in good conscience belongs to the defendant; and neither privity of contract, nor an express promise to pay, is necessary to maintain it.

3. *Same.*—When the name of a third person is inserted as mortgagee by mistake, caused by using a merchant's printed form without erasing his name, and the personal property conveyed afterwards comes into possession under a junior mortgage, and is sold by him, a person claiming by transfer and assignment from the first mortgagee may maintain an action against him for money had and received.

4. *Presumption as to character of wife's estate.*—In the absence of averment and proof to the contrary, property held by a married woman is presumed to be held as a statutory estate.

5. *Mortgage by husband, on crops to be raised on wife's land.*—The husband may, by mortgage or otherwise, anticipate the crops to be raised on lands belonging to the wife's statutory estate, when necessary to procure supplies, teams, implements, or other things essential to carrying on farming operations.

6. *Earnings of wife and minor son.*—The earnings of the wife during coverture, and the earnings of an unemancipated son, alike belong to the husband and father; his renunciation of his rights, in favor of his wife, is void as against his existing creditors; and it is subject to revocation, and is revoked by a mortgage executed before the consummation of the gift by delivery; as where the subject of the gift is the crops to be raised by the labor of the wife, and they are mortgaged by him before they are planted.

APPEAL from Butler Circuit Court.

Tried before Hon. JOHN P. HUBBARD.

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This was an action for money had and received commenced in February, 1883, by Thomas. F. Potter against Boyett & Wimberly, a mercantile firm of Greenville, Ala. The amount in controversy was the proceeds of certain cotton sold by the defendants; the plaintiff asserting title thereto under the following instrument which was introduced in evidence: "State of Alabama, Butler county, Greenville, Ala., Februry 6th, 1882, \$50.

"On the 1st day of October next, I promise to pay to Boyett & Wimberly, or order, the sum of fifty dollars, in consideration of poney this day advanced by them, which advances were obtained by me, *bona fide*, for the purpose of making a crop on my plantation in Butler county, Ala., during the year 1882; and without such advances it would not be in ——— power to procure the necessary teams, provisions, farming implements and fertilizers to make a crop on said plantation. It is agreed and understood that this note is made to secure a lien on all my stock, and whole crop raised by me on my land or elsewhere in the year 1882. And I hereby waive all my right of exemption under the constitution and laws of the State of Alabama of any property, or that may be hereafter owned by me as to the collection of this debt, and to secure payment of the same, I hereby convey to them one horse poney, "old," all my live stock, and also the entire crop of cotton, corn, and other produce raised by me during the year 1882, on my land or elsewhere; all or any of which property they may, after this note matures, and for the payment thereof, seize and sell at public auction for cash before the courthouse in Greenville, Ala., after posting for ten days a written notice of sale on said courthouse door. I agree to pay all attorney's fees, or other expenses, in recording and collecting this note, and further certify that this property is unincumbered."

Attest : J. F. BARGANIER, }
A. B. DULIN. }

J. M. GAFFORD.

This instrument, as shown by the bill of exceptions, was executed to Boyett & Wimberly by mistake; the actual intent and purpose of said Gafford being, as conceded, to make it payable to one D. B. Taylor, who testified, as a witness for the plaintiff, Potter, who sues as the transferee of said Taylor, "that he, Taylor, sold to J. M. Gafford a horse, and having no blanks of his own went into the store of Boyett & Wimberly and asked A. B. Dulin to fill him out a blank for the horse, and that A. B. Dulin filled out this blank and did not erase the names of Boyett & Wimberly thereon printed and insert Taylor's, thus in this way made it payable to Boyett & Wimberly at the time, instead of to witness, Taylor; but this was unknown to witness at the time and was not known to him till he traded

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it to Potter. That afterwards, when he (D. B. Taylor) sold the contract to plaintiff he discovered that the paper was made payable to Boyett & Wimberly, and that he, Taylor, requested Dulin to write the transfer, and he did so." The defendants, whose claim is founded on an instrument similar in its terms to the above, objected to the testimony of said Taylor touching the execution of this paper, and its subsequent endorsement to Potter, and duly excepted to the ruling of the court permitting it to go to the jury.

Said Gafford, as further shown by the bill of exceptions, died in October, 1882, and the cotton in question was sold by his widow and a minor son to the defendants shortly thereafter. The remaining facts, and the character of the claim asserted by Boyett & Wimberly to the property in controversy, are sufficiently stated in the opinion.

GAMBLE & RICHARDSON, for appellants.

STALLINGS & WILKINSON, *contra*.

CLOPTON J.—Neither of the instruments set out in the record—the one under which the plaintiff claims, nor the one under which the defendants claim—is sufficient to create a statutory lien. It has been frequently and well settled, that the statute, giving liens for advances to make crops, which displace and override all other liens though of prior date, except the lien of the landlord for rent and advances, must be strictly construed; and the note, or obligation must, in its terms, substantially conform to the requirements of the statute. The lien can only be created as security for a debt, having for its consideration an advance of one or more of the articles expressed—"horses, mules, oxen, or necessary provisions, farming tools and implements"—or money to purchase the same. However essential other things may be to make a crop, the statutory lien can not be extended by the contract of the parties to include them. And the advance must be made at the time of the execution of the instrument; contemplated future advances are not embraced.—*Evans v. English*, 61 Ala. 416; *Tison v. Peo. Sav. & Lo. Ass'n*, 57 Ala. 323; *Schussler v. Gaines*, 68 Ala. 556. The written instruments, however, may be regarded as mortgages, and the rights of the parties determined accordingly.

The action is brought by appellee to recover money, the proceeds of cotton received and sold by defendants, his right to a recovery being based on the ground, that the cotton was included in the mortgage executed by Gafford, Sr., to Taylor, and transferred to him. It is insisted, that as the mortgage is made to the defendants as mortgagees, though by mistake, and

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the intention was to have made it in Taylor's name, the legal title to the property is thereby vested in the defendants, and that the plaintiff can not maintain the action. The action for money had and received is an equitable remedy, and may be supported, when the defendant has received money, which in good conscience he ought not to retain, and which, *ex æquo et bono*, belongs to the plaintiff. In such case, the law implies a promise to pay, and privity of contract is not necessary. The legal title will not be regarded, unless it carries a legal right to retain the money.—*Harper v. Claxton*, 62 Ala. 46; *P. & N. Ins. Co. v. Tunstall*, 72 Ala. 142. The defendants do not claim any interest in the debt secured by the mortgage. The consideration wholly moved from Taylor, and he was entitled to the proceeds. Though the mortgage may have operated to pass the legal title to the defendants, a right and equity in Taylor were created which a court of equity would compel them to observe and carry into effect. By the transfer and delivery of the debt and mortgage, his right and equity passed to the plaintiff, entitling him to the money secured. To this purpose, the assignment in the names of the defendants by their bookkeepers was immaterial and unnecessary. If the mortgage is a lien on the cotton received and sold by them, entitling the plaintiff to the proceeds of sale in priority of any lien or claim asserted by the defendants, he may on his equitable right and title maintain the action.

The mortgage was made February 6, 1882. The defendants claim the right to retain the money, by reason of the cotton having been delivered to them under a mortgage executed in April, 1882, by the wife and minor son of the mortgagor in the first mortgage; and the right of the wife and son is rested on a gift of the crop, before it was planted or before anything was done towards making a crop, by the husband and father, he agreeing to furnish a horse. Mrs. Gafford testified orally, that the land, on which the cotton was raised, is her property, that she bought it from her husband, and has been in possession, claiming it, for nineteen years. The court instructed the jury, that if the gift was made after the mortgage under which plaintiff claims, it was inoperative as against the lien; and if made before, Gafford, Sr., had the right to disaffirm and revoke it, and giving the mortgage was a revocation though the land may be Mrs. Gafford's. The instruction involves the authority of the husband to mortgage the crops raised on lands the statutory separate estate of his wife, and the validity of a gift of the crops, before planted, to her and his minor child, as against the mortgagee. We say *statutory* separate estate, for the reason that no conveyance was produced showing the character of the estate. In the absence of proof, that a deed or

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other instrument was made creating an equitable separate estate, or that such was the character of the consideration paid, the presumption arises, that the land is her statutory separate estate.

The authority of the husband over the rents, income, and profits of the wife's statutory separate estate has been heretofore considered in several cases. He is entitled to receive and control them, without being required to account therefor with the wife, her heirs or legal representatives, charged with a trust to apply them to the support and maintenance of the family, not expressly declared by the statute, but a duty devolved by judicial construction. In legal contemplation, he is regarded as having the ownership, the entire interest in the rents, income and profits during the continuance of the relation of husband and trustee, and may make a valid disposition and transfer of such ownership.—*Murphree v. Singleton*, 37 Ala. 412. Though not liable to the payment of his debts so long as they remain merely income and profits, when used by the husband in the purchase of property, the property purchased belongs to him with all the incidents of property, and is subject to the payment of his debts.—*Daffon v. Crump*, 69 Ala. 77. The appropriation of them to his own use is not a conversion of the property of the wife, though it may be cause of removal from the trusteeship, and such appropriation does not constitute a consideration sufficient to support a conveyance of property of the husband in payment thereof, against his existing creditors, on the ground that a promise to pay them is without legal consideration and incapable of being enforced, and such conveyance is a gift of *his* property.—*Early v. Owens*, 68 Ala. 171. He has the right, and is charged with the duty, to manage and control the separate estate in such manner as will make it available for the purposes for which he receives the rents, income and profits, and may use them in any mode requisite to produce this result. The *corpus* of the separate estate is not liable for farming expenses. For these the husband alone is liable, and unless he is authorized to employ the income and profits in conducting such business, the wife's land might remain uncultivated and unfruitful. From the foregoing principles and from the duty arising from the dual relation of husband and trustee, the logical sequence is, that he may anticipate, by mortgage or otherwise, the crops to be raised on the lands of the wife, when necessary to procure supplies, teams, implements, or other things essential to carry on the farming operations.

The terms of the gift are, as testified by Mrs. Gafford, that Gafford, Sr., being in bad health and unable to work in the farm, gave her and her son the crop, before it was planted or anything was done towards making it, if they would raise it,

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and he would furnish a horse to make it with. The cotton in question was the product jointly, of the land, the labor of the wife and son, and of the horse furnished, being the same purchased from Taylor. The earnings of an unemancipated child belong to the father, and the earnings of the wife are the property of the husband at common law, which in this respect was not abrogated or modified by the statute in force at the time of this transaction. Though the husband may renounce all right to the earnings of the wife, and permit her to retain them as her own, such renunciation is void as against his existing creditors.—*Glaze v. Blake*, 56 Ala. 379; *Gordon v. Tweedy*, 71 Ala. 202. It is unquestionable that if the transaction had been a complete gift consummated after the indebtedness was contracted it would be invalid and inoperative against the right of the plaintiff. If of prior date, the effect and operation depend upon the nature and character of the transaction. At the time the agreement was made, the crop was unplanted. There was not and could not have been a delivery of the subject-matter of the gift, until it came into existence. Without delivery there is no perfected gift. The transaction is a mere executory agreement to give, which being voluntary, is incapable of being enforced. The title did not pass and the dominion was not surrendered.—*Walker v. Crews*, 73 Ala. 412. A promise to give is revocable until delivery; and the execution of the mortgage before the crop was planted was a revocation *pro tanto*.—*Frisbie v. McCarthy*, 1 Stew. & Por. 56.

Affirmed.

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Action for Damages for Breach of Contract.

1. *Submission to arbitration by partner*.—One partner has no right, without the concurrence of his co-partners, or against their objection, to submit a pending suit to arbitration; and such submission by him, and an award rendered under it, are no defense to the action. (Overruling *Cochran v. Cunningham*, 16 Ala. 448.)

APPEAL from the Circuit Court of Bibb.

Tried before the HON. JAMES E. COBB.

This was an action brought by Thomas M. Fancher, Henry C. Fancher and John C. Williams, partners doing business under the name of Fancher Bros. & Co., against the Bibb

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Furnace Company, a partnership operating a furnace in Bibb county, and was commenced Oct. 14, 1882. It was a claim for damages alleged to have been sustained by plaintiffs by the failure of the defendant to make advances in money and supplies to plaintiffs, under an agreement which had not been complied with by said defendant. The record shows that after the commencement, and pending their suit, another action was begun by the same plaintiffs, suing as *late partners* under the name of Fancher Bros. & Co., and against the same defendant, the Bibb Furnace Co., here described as a corporation under the laws of Alabama. This latter suit was commenced Sept. 22, 1883. By order of the court these two causes were consolidated, by consent of the parties, on 17th Sept. 1884. The defendant pleaded in defence of the whole action, an award that had been rendered upon submission to arbitration which had been entered into by and between the defendant and the plaintiff, Thomas M. Fancher, acting for himself and his partners, on the 17th of March, 1885; in which submission it was agreed between the parties that all matters in controversy in said pending suit should be settled, and that the parties would faithfully abide by the award. The result of the arbitration was adverse to the plaintiff. The plaintiffs replied that said submission and award were unauthorized by the partners of Thomas M. Fancher, and were, in other respects, illegal; setting up, among other things, that there had been a previous submission to arbitration by the parties, which submission had never been vacated or set aside, and that at the time of the submission relied on by the defendant, the partnership of Fancher Bros. & Co. had been dissolved. The court having sustained the demurrer interposed by defendant to this replication, issue was joined on defendant's pleas setting up a submission and award; and a verdict was rendered in favor of the defendant. Whereupon the plaintiffs take this appeal, assigning for error the adverse rulings of the court in overruling the demurrers of plaintiffs, and in sustaining the demurrers of the defendant, and in giving the affirmative charge for the defendants.

SUTTLE & PETERS, TROY, TOMPKINS & LONDON, for appellants.

1. The current of authority is decidedly against the right of one partner to bind his co-partners by a submission to arbitration during the continuance of the partnership; and it is certain that he can not do so after dissolution. To authorize a submission under such circumstances would require an express authority, or a subsequent ratification. Morse on Arbitration, 7; *Stead v. Salt*, 3 Bing. 101; *Hatton v. Royle*, 3 H. & N., 500; *Martin v. Thrasher*, 40 Vt. 460; *Adams v. Bankart*, 1

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Crompton, M. & R. 681; *Backus v. Coyne*, 35 Mich. 5; 1 *Ib.* 367; *Harrington v. Higham*, 13 Barb. 660; *McBryde v. Hogan*, 1 Wend. 326. The direct point has never been decided by this court, but the principle upon which it rests has been repeatedly recognized.—*Yung's Heirs v. Waring*, 17 Ala. 145; *Wyatt & Morse v. Bell*, 41 Ala. 222; *Cunningham v. Bragg*, 37 Ala. 436; *Barringer v. Sneed*, 3 Stew. 201.

While the award may be binding on Thomas M. Fancher, it is no defense to a suit by the partnership. It could only bind the interest of Thomas M. Fancher in the partnership, which could be determined by a settlement of the partnership. There could be no set-off in this case, of a claim against said Thomas M. Fancher.—*Sayre v. Watts*, s. c. of Ala. Manuscript; *Steed v. Salt*, *supra*; *Martin v. Thrasher*, 40 Vt. 460; *Nall & Brooks v. McIntyre*, 31 Ala. 532. The award is absolutely void. It was not good as a statutory award, and the court so decided upon a motion to enter it up, which made that question *res adjudicata* as to these parties.—*Dudley v. Farris & McCurdy*, 79 Ala. 187. The parties having intended it as a statutory award it is invalid for any other purpose, 20 Pick. 480; 3 Wis. 225; 9 Col. 142; Code of 1876, §§ 3536, 3550. See, also, in analogous cases, Cooley's Con. Lim., p. 500.

HARGROVE & LOGAN, *contra*. There are many respectable authorities recognizing the right of one partner to bind his co-partners by submission to arbitration. Caldwell on Arbitration, 25; *Taylor v. Coryell*, 12 S. & R. 243; *Halleck v. March*, 25 Ill. 48; *Southard v. Steele*, 3 F. B. Monroe, 435. However, it can not be controverted that, by submission of partnership matters, a partner does not bind himself. Bacon's Abridg. (C.) Arbitration; Kyd on awards; *Jones v. Barley*, 5 Cal. 345; 1 Pet. 222. In an action at law by partners, all must be entitled to recover, or the action can not be maintained, 16 Ala. 448; Story on Part. Ch. 12, p. 360–365; 16 Gallison, 130; 16 John. 438. 1 Par. on contract (Ed. 1860) p. 26. In a joint action all must recover, or none can.—*St. Clair v. Caldwell & Riddell*, 72 Ala. 527; *Bell v. Allen*, 53 Ala. 126. If the award is not good as a statutory award, it is good as a common law award—courts construe awards liberally. 9 Ala. 767; 54 Ala. 78; 1 Pet. 222; Caldwell on Arb. 279; Kyd on Awards, 381; Wait's Ac. & Def. vol. 6, pp. 546–7. Submission in a manner not required by the Code may be regarded as an amicable settlement of the matters between the parties. 66 Am. Dec. 95; 3 Iowa, 463. See also 8 Ala. 466.

STONE, C. J.—A partnership consisted of three members, but had been dissolved. Two suits were pending in favor,

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and in the names of all the partners suing as partners. One of these suits had been commenced before, and the other after the dissolution. They were consolidated and became one suit. One of the partners, by agreement made out of court, without the concurrence or assent of the others, but against the protest of the one who alone was consulted, entered into an agreement to submit the matters in controversy to the arbitration of three named arbitrators. The arbitrators acted, attended by the partner who had entered into the agreement of submission, and made their award in favor of the defendant. The dissent of the other partner was not known to the defendant until after the award was made. Is this a defense to the action? Both reason and the weight of authority hold that the submission was not binding on the partners who did not participate. 1 Coll. Part. § 441; Story Part. § 114; Parson's Part. *176 *et seq.*; Morse Arb. and Award. 7; Note to *Hutchins v. Lewis*, 30 Amer. Dec. 630; *Scarborough v. Reynolds*, 12 Ala. 252; *Huber v. Zimmerman*, 21 Ala. 488; *Wright v. Evans*, 53 Ala. 103; *McBride v. Hagan*, 1 Wend. 326.

There is a principle of law that when two or more unite in bringing an action, all must recover, or none can; that if one has disabled himself to maintain the suit, this precludes the others from recovering, for they can only have a joint recovery. And there are authorities which hold that this principle applies to suits by partners.—*Sahnon v. Davis*, 3 Amer. Dec. 410. There is one case in this State which seems to recognize that doctrine.—*Cochran v. Cunningham*, 16 Ala. 448, s. c. 50 Amer. Dec. 586.

The relations, rights, and powers of simple co-obligees are very different from those of copartners. The former are presumed to own each, a *pro rata* separable interest, and to have power over the subject of contention, equal to the proportion he sustains to the whole number; say, one-half, one-third, one-fourth, etc. Hence, *prima facie*, he can make a valid disposition of his undivided but separable part, without any reference to any other subjects of joint ownership between him and his co-obligees or joint owners. We say *prima facie*; for circumstances may exist which would vary this rule.

Partnership is different. No one member can claim an individual or separable interest in any article or subject of the partnership property. The partnership is itself a personality, and may be sued as such. The members individually can claim no absolute right to any part of the partnership effects. As between themselves, the partnership property is held in trust, and under a lien; first, to pay and discharge all the part-

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nership liabilities; second, to equalize and adjust accounts and inequalities between the partners; and, third, to divide any balance in proportion to their several stipulated interests.—*Warren v. Taylor*, 60 Ala. 218. Hence, there is no individual ownership in the several partners, except on a division of the *residuum*, after paying the partnership debts, and after adjusting the accounts between themselves.

It results from these particular characteristics of partnership property, that no individual member should be able, beyond the sphere of his admitted powers, to defeat the purposes of the trust, or to hinder the utilization of the effects in discharging the liens which each partner has upon them. If one member can sell, remit, or encumber his interest in a part of the effects, and thereby destroy or impair the customary methods and remedies for reducing them to actual possession that they may be administered, a better reason should be given for such pernicious power than we have heard suggested, or can conjecture. Set-off of a partner's individual debt is not allowed against a partnership demand.—*Watts v Sayre*, 76 Ala. 397. Why should estoppel against, or *remittitur* by one partner, have a greater effect? If it be said the firm, or a majority of the partners have their remedy in equity, we inquire how, and against whom? Is it against the individual partner who has estopped himself? He may be insolvent; and it would seem that, as the estoppel and hindrance extend only to his proportional interest, he should not be held accountable to a greater extent. Is the equitable recourse to be asserted against the debtor, who has defeated the action at law by making good the defense of estoppel against one? This would be to reverse the order of things, and to cast on the unoffending members of the firm the burden of relieving themselves from the complication their offending co-member had unwarrantably brought upon them. We need not enter into an elaborate discussion to show how utterly opposed to the principles asserted in analogous cases, such doctrine would be. Let a single illustration suffice. The interest of a partner in partnership effects is sold under execution against him alone. The purchaser acquires no title to any specific property. He purchases only the ultimate interest of the execution debtor, which is his share of the *residuum*, after the partnership debts are paid, and the accounts among the partners equalized.—*Andrews v. Keith*, 34 Ala. 722; *Daniel v. Owens*, 70 Ala. 297. This could not and would not cast on the remaining partners the duty of instituting proceedings to ascertain and separate the purchaser's interest.

The rulings on this question in this State are not in har-

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mony. As we have said, the case of *Cochran v. Cunningham*, 16 Ala. 448, seems to support the defense here relied on.—*Cunningham v. Carpenter*, 10 Ala. 109, had ruled the other way. And *Crymes v. White*, 37 Ala. 549—a later case—is in harmony with *Cunningham v. Carpenter*, *supra*; *Burwell v. Springfield*, 15 Ala. 273; *Steed v. Salt*, 3 Bing. 101; *Nall v. McIntyre*, 31 Ala. 532; *Martin v. Thrasher*, 40 Vt. 460. We adhere to the doctrine declared in *Cunningham v. Carpenter*, *supra*.

The judgment of the Circuit Court is reversed and the cause remanded.

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Bill in Equity to Establish and Enforce Vendor's Lien.

2. *Burden of proof as to payment of purchase-money.*—Under a bill to enforce a vendor's lien on land, while the *onus* of proving payment may be on the defendant, the recital of payment in the conveyance makes out a *prima facie* case, and shifts on the complainant the *onus* of rebutting or overcoming it.

2. *Vendor's lien; proof as to non-payment of purchase-money.*—Where the conveyance recites payment of the purchase-money, and it is not shown that any notes were executed by the purchaser at the time it was delivered, a vendor's lien will not be declared on vague or doubtful testimony; the proof must be sufficient to enable the court satisfactorily to determine, not only the fact that the purchase-money is unpaid, but also its amount; and when uncertainty and conflict as to material facts exist, and the defendant's version of the transaction is sustained by disinterested witnesses, a lien will not be declared.

APPEAL from Wilcox Chancery Court.

Heard before Hon. N. S. GRAHAM.

This was a bill in equity exhibited on 23d March, 1883, by Thomas G. Jenkins, administrator of the estate of W. J. McLean, deceased, against Mary Mathews, and sought to establish and enforce a vendor's lien on certain lands sold and conveyed to the respondent by said McLean in his life-time. The facts are sufficiently stated in the opinion.

S. J. CUMMING, for appellant.

JNO. Y. KILPATRICK, *contra*.

CLOPTON, J.—The purpose of the bill is to enforce a vendor's lien. The record only raises a question of fact—indebt-
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edness *vel non* for the purchase-money of two parcels of land, sold and conveyed, January 1, 1881, by Dr. McLean, complainant's intestate, by separate conveyances to defendant. Each deed contains a recital, acknowledging the payment of the purchase-money; but the bill alleges that it was not paid, and that defendant still owes the amount thereof, with interest from the date of the conveyances. The theory of complainant is, which he seeks to establish by evidence, that defendant gave the vendor two notes, a separate note for the purchase-money of each of the parcels of land, and that having access to his papers, she abstracted the notes during his last illness, or immediately after his death. The defendant denies having given any notes, and sets up as a defense that she paid for the lands; in this, that the vendor was indebted to her, and sold and conveyed the lands in payment of such indebtedness.

While the burden of proof may be on defendant to show payment, the recitals of the conveyances make a *prima facie* case, and shift on complainant the *onus* to rebut or overcome the presumption arising on the face of the deeds. This he endeavors to do, mainly, by the evidence of Baxter McLean and W. A. McLean, who testify, that they saw notes of the defendant in the possession of the vendor a short time before his death, which occurred in September, 1881; and by the evidence of Mrs. Powe, who testifies to declarations of Dr. McLean, which were admitted without objection, and considered by the chancellor. Baxter McLean, while sustained by some witnesses, is impeached by others as to his general character, and also by his statements, that, on account of his hostile feelings to defendant, growing out of her refusal to give him some property, he would do all he could against her. His testimony is impressed with improbability, and but little, if any credibility attached to his evidence. The evidence tends to show, that he could not read writing, and was incapable of distinguishing a note from any other written instrument, or of telling the name of the subscriber. The declarations of Dr. McLean, as testified by Mrs. Powe, were, that he had defendant's notes in his pocket, and that he had given her four years in which to pay for the land. This evidence does not sustain the allegations of the bill, and, if true, show it was prematurely brought. W. A. McLean, who is the brother of the decedent, is the only unimpeached witness, who testifies to having seen the notes; and the weight of his testimony is somewhat impaired by the statement, that he saw the notes in the house in which Dr. McLean died about two weeks before his death, which was prior to the time Baxter McLean states the papers were carried there.

Omitting consideration of defendant's own testimony, and

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without detailing the testimony of the other witnesses examined on her behalf, the evidence, which she introduces to establish her version of the matter, consists of proof, that the vendor received the proceeds of cotton shipped to Mobile in her name, and of other cotton having private marks, in which she claimed a joint interest; of his admissions that he was indebted to her, and had used her money to pay security debts; of his declarations during his last illness, made to Holloman, to whom he was speaking of his affairs, and to whom he expressed the wish that he would settle up his business, without mentioning conveyances and notes, that the lands were the property of defendant; and of his statements to the person who wrote the deeds, and is a subscribing witness, on two occasions, the last being about an hour before they were executed, that he had used the defendant's money at various times; that she wanted it to buy land, and not having the money, he had to let her have the lands; and the potent fact, that the conveyances were delivered, without the execution of any notes at the time.

When the conveyance recites payment of the consideration, a vendor's lien should not be enforced on vague or doubtful testimony. The proof should be of such character, that the court may satisfactorily determine the amount, as well as the fact of the unpaid purchase-money. Neither of complainant's witnesses states the amount of the notes, or any recollection thereof. The court is left to mere conjecture, or inference. While the amount of the indebtedness of the vendor to the defendant, and the items composing it, are not clearly shown, his admissions and declarations supply the deficiency, as against his personal representative. Defendant's witnesses have no interest in the case, and are apparently without feeling. There being uncertainty and conflict as to material facts, and there being disinterested witnesses who sustain the defendant's version of the transaction, especially the draftsman and subscribing witness, who was called to attest, and to whom the vendor stated his purpose in making the conveyances, too great doubt falls on the equity of complaint to justify a decree in his favor.—*Daniel v. Collins*, 57 Ala. 625.

The chancellor did not err in finding the proof insufficient to overcome the presumption of payment arising from the recitals of the conveyances.

Affirmed.

[City Council of Montgomery v. Townsend.]

City Council of Montgomery v. Townsend.

Action for Damages Against Municipal Corporation, Caused by Grading Street and Sidewalk.

1. *Constitutional provisions regulating the taking of private property for public use by corporations.*—Under constitutional provisions formerly of force in Alabama, private property could not “be taken or applied for public use” by municipal corporations, without making just compensation; and this excluded a liability for consequential injuries, when there was no appropriation of the property itself. But the constitutional provision now of force (Art. XIV, § 7) requires corporations, invested with the power of taking private property for public use, to “make just compensation for the property taken, injured or destroyed by the construction or enlargement of its works, highways, or improvements;” and this new provision should be liberally construed in favor of the citizen.

2. *Same; grading, construction or enlarging of streets and sidewalks.* Under this constitutional provision, while compensation is required for property taken, injured or destroyed in the exercise of the right of eminent domain by a public corporation, the liability is limited to injuries, caused “by the construction or enlargement of its works,” etc.; and this neither restricts the liability to the original taking and opening of a street, leaving the corporation at liberty to make subsequent changes by grading at its own will and caprice, nor does it impose a liability for additional compensation on every subsequent change by grading or otherwise. Ordinary and reasonable changes and improvements, due to the natural formation of the surface, or to a safe and convenient way (including sidewalks), are presumed to have been contemplated by the parties at the time of the original taking or dedication, and compensation can not afterwards be claimed for injuries resulting therefrom; but a material change in the street (which also includes the sidewalks), caused by a contingency which could not have been reasonably and fairly foreseen, or made merely because the corporate authorities may judge that the public convenience would be thereby increased, or the general appearance of the streets improved, if injury is thereby caused to the adjoining premises, is a new injury, for which compensation may be claimed.

3. *Same; question for court or jury.*—Whether the cutting down of the sidewalk adjacent to plaintiff’s lot, to the level of the street below (about fifteen feet), was a *construction* of the highway within the meaning of the constitutional provision, was a mixed question of law and fact; and the court erred in instructing them that the plaintiff was entitled to recover, if his property was injured, without regard to the circumstances or character of the alteration.

4. *Same; measure of damages.*—If the plaintiff is entitled to recover compensation for the injury to his property, the measure of his damages is the difference in the market value of his lot before and after the sidewalk was cut down; and neither the falling of his brick wall, nor the apprehended undermining of his house by subsequent rains can be considered in estimating the damages.

[City Council of Montgomery v. Townsend.]

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

This was an action brought by George W. Townsend against the city of Montgomery, suing for damages alleged to have been done his property on the corner of Goldthwaite and Herron streets in said city, by reason of cutting down the sidewalk contiguous thereto. The complaint avers that the defendant dug and cut away the sidewalk adjacent to his abutting lot, thereby leaving said lot twenty feet above the street below, cutting off all ingress and egress to and from said lot, thus destroying the value of plaintiff's property. To the complaint defendant demurred, that there was no averment in the complaint that the defendant invaded or trespassed upon the property of the plaintiff, and that the court would take judicial notice that by defendant's charter it had the right to change the grade of sidewalks, to raise and lower them as the public good required. These demurrers being overruled the defendant went to trial upon the plea of "not guilty," and also upon a special plea setting up that for fifty years and more the streets and adjacent sidewalks described in the complaint had been public streets and sidewalks, which the defendant, by its charter, were required to keep in safe repair, and that the grievances complained of were such only as necessarily resulted from the lawful exercise of the authority to grade the sidewalks and streets, which had been prudently and skillfully done by defendant. Evidence was offered by the plaintiff, upon the trial of these issues, to show that by reason of the cutting down of the sidewalks adjacent to his property, the washing of the rain had caused a brick wall forming a fence along the sidewalk, to fall, and that some of the houses on said lot were in danger of being undermined and thrown down from the same cause. To this evidence the defendant objected, on the ground that defendant was not bound to furnish the plaintiff with lateral support for his soil, but the objection was not sustained by the court. The defendant also objected to the evidence offered by the plaintiff to show the difficulty of access and egress to and from his lot, resulting from the lowering of the sidewalks, as set out in his complaint, as the same was not a legal element of damage in the case. There was a verdict for the plaintiff, and the defendant takes this appeal. The opinion states the contentions that arose on the trial, and points out the error committed by the court which operated a reversal of the case.

JONES & FALKNER, and W. S. THORINGTON, for appellant.

THOS. H. WATTS, and W. L. BRAGG, *contra*.

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CLOPTON, J.—The action is brought by appellee to recover damages for injury caused to his property by cutting down, under the direction of the City Council of Montgomery, the adjacent sidewalk in front thereof. The street on which the lot of plaintiff is situated is within the corporate limits of the city, was dedicated to the public more than half a century ago, and has been continuously used and recognized as a public street. The level of the other part of the street is, and has been for many years, from fifteen to twenty feet lower than the surface of the sidewalk, on which persons entered from the street by ascending a flight of steps. The sidewalk having been for several months in an unsafe condition, and dangerous to passers thereon, the City Council, upon the examination and report of the city engineer, ordered it cut down to the level of the street. The authority of the City Council to cut down the sidewalk, and the duty to do so, if necessary to put it in a safe condition, are not disputed. In the performance of the work, there was no excavation or cutting beyond the width of the street as dedicated and originally constructed, and it is not claimed, that a want of reasonable care and skill is shown. The plaintiff does not controvert the non-liability of the corporation for consequential damages, in the absence of statutory or constitutional provisions, imposing such liability. The contestation arises on the construction of the clause of the constitution requiring municipal corporations to make just compensation for property taken, *injured*, or *destroyed*, for public use.

The preceding constitutions provided: "That private property shall not be taken or applied for public use, unless just compensation be made therefor, nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner." The clause of the present constitution, now under consideration, should be construed in the light of the provisions of its predecessors. Under such provisions, as construed by the courts, no liability for compensation accrued, unless there was an appropriation—a taking or invasion—of the particular property. A municipal corporation was not liable to answer, for consequential damages, to the owner of property not taken, when there was no want of reasonable care and skill. Acts done by such corporations, under valid legislative authority, exercising the power of eminent domain, and not directly encroaching upon private property, did not constitute a taking, in the meaning of the constitution, and did not entitle the owner to a right of action, however much its value and use may have been impaired. The value of adjoining property might be seriously depreciated and even destroyed without right of compensation, because unac-

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accompanied by actual, direct, physical interference. In such case, the protection of private property was sacrificed to the good or convenience of the community; and the individual loss or injury was regarded *damnum absque injuria*, to be borne by the citizen for the public benefit.

The practical operation of such general provisions having demonstrated, that compensation *only* for property taken or applied was ineffectual to protect the citizen against oppression and injustice, by reason of the abuse of the privilege, with which corporations had been invested, in disregard of the interests and rights of the individuals, the tendency is in revising the several State constitutions, to abrogate by the organic law, a rule, which has no foundation in natural justice, and rests on no sound principle of just government, or of equal administration of powers. Influenced by these considerations, the framers of the present constitution, not only incorporated the general provision of the preceding constitution, but also an additional and special provision, having reference to municipal and other corporations and individuals invested with the privilege of taking private property for public use. Section 7 of article 14 of the constitution declares: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury, or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages made by viewers or otherwise; and the amount of such damages in all cases of appeal shall, on demand of either party, be determined by a jury according to law." This mandatory clause being a new provision—an extension for the protection of property—introduced into a revised constitution, should be liberally construed in favor of the citizen, and so as to secure the purposes intended, as ascertained from the considerations which produced its introduction. It operates a further limitation on the right of eminent domain, from which the State alone is excepted, and establishes a new rule, supported by better reason, and founded in equal justice. The words, *injured or destroyed*, were not used in vain and without meaning. It was intended that they should have effect, and unless they operate to impose a liability not previously existing, they are without operation. The new rule proclaimed by the constitution imposes a liability for private property *injured or destroyed*, though not taken—a liability for consequential damages, from which municipal corporations were theretofore exempt. The construction has been placed

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on a corresponding clause of the constitution of Pennsylvania, by the Supreme Court of that State, of which ours is a copy. *Redding v. Atthouse*, 93 Penn. St. 400.

A material question is, in what cases and under what circumstances does the constitution impose the new and additional liability? In this connection our consideration has been cited to the decisions of the courts of several of the States, as sustaining plaintiff's contention, that a municipal corporation is liable for the injury done to an abutting lot by any grading of an established street. By these decisions, it is substantially held, that the recent constitution made no difference as to the form of the public use, and that an abutter is entitled to recover the consequential damages caused to his property by raising or lowering the grade of a street.—*City of Elgin v. Eaton*, 83 Ill. 335; *Reardon v. San Francisco*, 66 Cal. 492; *Hannon v. Omaha*, 17 Neb. 548; *Atlanta v. Greene*, *Johnson v. Parkersburg*, 16 W. Va. 403. It should be remarked, however, that in the subsequent case of *Rigney v. Chicago*, 102 Ill. 64, where the same question came again before that court for consideration, three of the seven justices dissented, and the Chief Justice, who concurred in the conclusion, qualified the rule in a separate opinion. The provision in the constitution of each of these several States is general and unrestricted; "private property shall not be taken or damaged for public use," without compensation. The presumption is reasonable, that the convention, which framed the constitution, compared and considered the recent constitutions of other States. And it is significant, in view of the well settled rule respecting the liability of municipal corporations for damages done to adjoining lots not encroached upon, by changing the grade of the streets, or making other alterations, that the convention failed to ordain a provision general and unlimited, as provided in some of the constitutions, operating to abrogate *in toto* the previously settled rule, and adopted the qualified provision of the constitution of Pennsylvania, as sufficient to meet the requisite protection of private property, and at the same time, to answer the demands of public policy and public needs, on which is rested the right of eminent domain. In this there was a manifest intent; which has reference to the form of the public use—the restriction of the liability of two specified cases; "*the construction or enlargement of its works, highways, or improvements.*" Unless the injury or destruction is produced by a construction or enlargement of some work, highway, or improvement, which is a consequence of the use of the privilege of taking private property for public use, no liability for damages arises, under the constitution.

The next inquiry is, what is, in the meaning of the constitu-

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tion, a construction or enlargement of a highway? The purposes intended are, as ascertained from all the provisions of the section, to limit and qualify the right of eminent domain, making such limitation and qualification equally operative as to all corporations and individuals invested with the privilege. The section contemplates, that the General Assembly shall provide appropriate proceedings for the pre-ascertainment of the damages, protects the right of appeal from the preliminary assessment, and of having the damages assessed by a jury, and requires that the compensation shall be paid before such taking, injury, or destruction,—provisions only applicable and appropriate in case of a resort to the right of eminent domain. In all other cases, the liability of the municipal corporation remains dependent on common law rules, or statutory provisions.—*Edmundson v. Pittsburg*, 23 Amer. & Eng. R. R. Cas. 423. Having reference to the subject with which the convention was dealing, there are three interpretations open—to restrict the construction of a highway to its primary meaning, excluding subsequent alterations; or to extend it and include all alterations without reference to the primary construction; or only to a class of changes which may be regarded as separate and distinct uses of the right of eminent domain, as distinguished from the first taking or injury. We think that the last meets most fully the purposes of the constitution.

In laying out a town or city into lots, streets are absolutely necessary as a means of access, without which approach and enjoyment are denied to the lot-owner. They are equally necessary to its growth and development, to its trade, and the various uses and purposes, for which towns and cities are laid out and built. Land-owners, in laying out their lands preparatory to a sale of lots, withhold from sale certain parts at convenient intervals, and set them apart as streets and highways, to be kept open for the public through all coming time, as inducements to the purchase of lots; and the seller derives his compensation from the enhanced value and market price thereby imparted to the lots proper. Although there are no words of grant as to this appendent privilege, the sale of the lots, with the proclaimed attingent streets, is a complete dedication to the use of the lot-holder and the public as highways; as much so as if a deed were executed conveying the easement, or as if they had been condemned to public use under the power of eminent domain. The dedication is not restricted to the use of the street in its natural state; but is a surrender of its use to the public, as a thoroughfare—safe and convenient way for travel and transportation, extending the entire width including the sidewalks. As a rule, change of surface is essential to the proper enjoyment of this privilege, and dedication carries with it this right

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of change. Though the land-owner retains the ultimate fee, his right of property is subservient to the use and enjoyment of the easement by the public; and to the reasonable exercise of the authority of the municipal government to prepare and adapt it, and to make necessary improvements to continue its adaption, to the public convenience and safety. Authority to make all needed excavations or embankments or alterations, to render the street safe and convenient, is implied in the dedication, which follows the co-terminous soil, into whosoever hands it may pass. The anticipated size of the town or city, its probable commercial importance, and the proximity of the pass-way to public or business centres, are factors, which should enter into the computation; for all these must be presumed to have been had in view, when the dedication was made.

It is not the intent and operation of the constitution to infringe the existing rule as to the liability of the city for grading, altering, or improving the streets, farther than is essential to the protection of private property, and the equal distribution of the public burdens. Where land has been dedicated to the public for use as a street, the rule as to the liability of the municipality for subsequent alterations is the same, under the constitution, as if the land had been condemned under the right of eminent domain. In case of condemnation, the constitution does not operate to so restrain the power of municipal corporations over the streets, as to subject them, on each successive alteration and improvement, to liability for damages, when the same could legally, and should have been assessed on the first taking or injury of the property. A double liability is not intended, and unless all ascertainable damages are, or presumed to be assessed at once, the corporation might be made liable to a double recovery for the same injury. This rule exempts from liability for damages, arising from ordinary and reasonable changes and improvements, which may be due to the natural formation of the surface, or to the increasing wants of the public,—which injuries were capable of being foreseen and ascertained, could and ought to have been naturally anticipated, and are presumed to have been considered and included in the original assessment of compensation. Such changes or improvements are the natural and probable consequences of the uses and purposes for which the land was originally taken, and compensation then awarded; or in case of dedication, for which the owner received consideration in the resultant advantages.—*Denver v. Bayer*, 2 Amer. & Eng. Cor. Cas. 465; *L. & Y. Ry. Co. v. Evans*, 16 Beav. 322; *Lawrence v. Gt. No. Ry. Co.*, 16 Q. B. 643.

But the right of the municipal authorities to change the grade of a street, or alter it in other respects, is not unlimited,

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nor to be exercised capriciously. It is bounded by the nature of the use, for which the property was dedicated or condemned, and the necessities of a safe and convenient way, having reference to the wants of the community. To limit *construction of its highways*, as employed in the constitution, strictly to its *primary* signification, would exclude cases which come within its spirit, and defeat the particular intent, that compensation shall be made for every injury to private property for public use, in the forms specified; cases which came within the mischief and the constitutional remedy. The dividing line lies between what is necessary to safe and convenient use on the one hand, and what is in excess thereof and not essential thereto, or mere ornamentation on the other. Under this rule, the constitution requires compensation to be made for the extraordinary changes, which may not be due to the natural formation of the surface, nor to the mode of original construction, as then deemed sufficient to a safe and convenient way. A material change, operating injury to adjoining premises, occasioned by a contingency, which could not have been reasonably and fairly foreseen, or made merely because the corporate authorities may judge that the public convenience would be increased thereby, or the general appearance of the street improved, is a new description of injury, in the enlarged sense of the constitution, which casts on the property owner an additional burden, entitling him to compensation. Injuries by the construction of a highway, as provided for in the constitution, include those injuries produced by alterations, which could not have been naturally and reasonably anticipated, and damages for which could not have been legally awarded in the preliminary assessment, if the land is condemned, or if dedicated, which the owner would not be estopped to claim. This construction effectuates the cardinal purposes of the constitution—the protection of private property, and the equal distribution of the public burdens—avoids double compensation; and is applicable alike to all corporations, municipal and other, and individuals invested with the privilege of taking private property for public use. We are aware that we have left a wide margin for diversified opinion; but we can not lay down a more definite general rule applicable to all cases, where each case is dependent on its special facts and circumstances; as definite, however, as the rule which defines the prospective injuries, for which compensation may be recovered on condemnation of the land for public use. It applies when the municipal corporation is not the owner of the fee. If such owner, other rules may govern.

It follows, that whether the lowering of the sidewalk to the level of the street is a construction of the highway is a mixed

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question of law and fact. The court erred in not submitting the ascertainment of the facts to the jury, and in instructing them, that the plaintiff is entitled to recover if his property was injured, without regard to the circumstances or the character of the alteration.

If the plaintiff is entitled to compensation, the measure of damages is the difference between the market value of the lot before and after the lowering the sidewalk,—the diminution in value produced thereby. The falling of the brick fence, and the apprehended undermining of the house, caused by subsequent rains, are damages caused by the intervention of an independent agency, not put in operation by the act of the defendant, and too remote to be considered elements of damages.

Reversed and remanded.

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Bill in Equity to Enforce Vendor's Lien.

1. *Sale of decedent's lands for distribution; when title of heirs is divested.*—When a decedent's lands are sold for distribution, under an order and decree of the Probate Court, the title of the heirs is not divested until the purchase-money has been paid in full.

2. *Parties to bill.*—When a bill seeks to enforce a vendor's lien for the unpaid purchase-money of land, which was sold for distribution among the heirs of the deceased owner, under a decree of the Probate Court, all the persons in whom the legal title was vested are necessary parties.

3. *Same; who are heirs and next of kin of deceased grandchild.*—The only son of a deceased daughter, who left neither child, father, mother, nor maternal grandmother, living at the time of his death, being one of the heirs at law of the decedent; it can not be assumed that his four maternal aunts are his only heirs and next of kin, when that fact is not averred, and it is not shown that he left no grandfather, nor maternal grandmother, nor maternal uncle or aunts.

4. *Same; personal representative of deceased heir.*—It being shown that a part of the purchase-money for the land was paid, and was distributed in unequal proportions among the several heirs; the personal representative of a deceased heir, who had received more than his proportion of the money, is a necessary party to the statement of the account; and being made a party, on his own motion, after the account has been taken, the register's report made, and on the day before the final decree was rendered, the decree will be reversed at his instance.

5. *Decree distributing purchase-money; settlement of decedent's estate.* Under such bill to enforce the vendor's lien, a decree distributing the unpaid purchase-money can not be rendered without a statement of the

NOTE.—After the rendition of this decision, a consent decree was entered by the court, based on an agreement of counsel, which did not, however, affect in any manner the principles decided in the case.

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accounts of the deceased administrator, who was the purchaser, and who had made unequal distribution among the heirs; and this can not be done without a removal of the settlement of the estate from the Probate Court, under pleadings properly framed; nor can such removal be asked by the personal representative unless special equitable reasons are shown.

APPEAL from the Chancery Court of Dallas.

Heard before Hon. JNO. A. FOSTER.

This was a bill filed by Andrew H. Gardner, as administrator *de bonis non*, with the will annexed, of Garland T. Gardner, deceased, against R. U. Kelso and Virgil H. Gardner, and prayed the sale of certain lands which said defendants had purchased from the estate of said Garland T. Gardner, but for which they had not paid, and against which a vendor's lien for unpaid purchase-money was sought to be enforced. The bill alleges that the lands in question had been sold by order of the Probate Court for distribution, and at said sale Virgil H. Gardner and Mary Wyckoff became the purchasers,—that afterwards Mary Wyckoff transferred her purchase to Virgil H. Gardner, who executed his notes for the amount of the purchase-money; that these notes were not paid; that one R. U. Kelso, with knowledge that the purchase-money had not been paid, purchased from Virgil H. Gardner. The original bill was amended by making the heirs at law of Garland T. Gardner parties defendant. Upon submission on pleadings and proof the chancellor rendered a final decree, ordering the lands to be sold, and after payment of costs, attorneys' fees, and charges of administration, ordered the balance of the proceeds to be distributed among the heirs at law of the decedent, Garland T. Gardner, without reference to a final settlement of the estate. The other facts, material to the full understanding of the case, appear in the opinion of the court.

WHITE & WHITE, for appellants.—The court erred in decreeing distribution of the assets arising from the sale of lands due as unpaid purchase-money, without first requiring a settlement to be made of the estate.—*Worthy v. Lyon*, 18 Ala. 786. Bat Smith Lucy's share of the proceeds of the sale of the lands could only be properly paid to his personal representative.—*Chaney's Heirs v. Chaney's Adm'r*, 38 Ala. 35. Should it appear that A. V. Gardner owned the interest of Bat Smith Lucy in the estate of Garland Gardner, still as Lucy was an heir at law of Virgil H. Gardner, who was an heir of Garland Gardner, his personal representative was a necessary party. *McCarthy v. McCarthy*, 74 Ala. 547; *Dooley v. Villalonga*, 61 Ala. 129. All of the property of an estate, real and personal, is subject to administration.—38 Ala. 35; 23 Ala. 488.

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A. V. Gardner, as the assignee of Lucy, stands in his shoes, and must look to the personal representative for his interest in the estate.—8 Ala. 552; 35 Ala. 105; 11 Ala. 143; 20 Ala. 777. The court should have rendered a decree in favor of Lapsley, as administrator of Garland Gardner, and left him to distribute the fund on final settlement of the whole estate. The administrator of Lucy should have been made a party to this suit, for the purpose of representing that estate on the taking of the account of the amount due it for this land, and the payments which had been made on it.—61 Ala. *supra*; *Waller v. Gibbs*, 10 Ala. 130-1; *Bell v. Hals*, 76 Ala. 546. Citing also, 39 Ala. 221.

LAPSLEY & NELSON, for appellees.—1. The purchase by V. H. Gardner of Mrs. Wyckoff's half interest in the lands, and surrendering her notes was a waste of the assets of the estate, and amounted to a *devastavit*. It was shown by Kelso's letter of 23d of June that he bought with a knowledge at least that the Wyckoff half interest was unpaid for. In fact no part of the purchase-money had been paid. The Probate Court has no authority for executing a deed till the purchase-money has been paid. Kelso was bound to take notice of the defects in Gardner's title.—*Wallace v. Nichol's Adm'r*, 56 Ala. 325. See also, *Ketchum v. Creagle*, 53 Ala. 227; *Corbitt v. Clamy*, 52 Ala. 480; *Wood v. Sullens*, 44 Ala. 686; *Broadnax v. Owen*, 60 Ala. 467. 2. The lien for the unpaid purchase-money rests on the whole land; no part, no interest can claim exemption from the whole lien--the lien is indivisible and inseparable. *Wallace v. Nichols, supra*; *Wood v. Sullens*, 44 Ala. 686. 3. As to parties. The surviving sisters and brother of Garland Gardner are made parties. Bat Smith Lucy is shown to have died, leaving no heirs other than the present parties to this suit. The legal title to the lands is before the court, and there is no need to make the administrator of Lucy a party. 4. There is no equity in the cross-bill of defendants. Whatever rights the complainants in the cross-bill have, they must have existed at the time of the filing of the bill (cross), and not accruing subsequently.—63 Ala. 595, and cases there cited.

STONE, C. J.—Lands of which Garland T. Gardner died seized, were sold for distribution under decree of the Probate Court. The sale was on a credit of one, two, and three years, maturing in 1861, 1862 and 1863. Virgil H. Gardner, one of the executors of Garland T. Gardner's will, together with another, became the purchasers, each being heir to the testator. By subsequent arrangement between the purchasers, Virgil H. Gardner became sole purchaser, and assumed the payment of

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the entire purchase-money. The sale was reported and confirmed, and no question is raised on the regularity of the proceedings up to this point. Garland T. Gardner died without lineal descendants, never having been married. His next of kin, heirs at law at the time of his death, were Virgil H. Gardner, his brother, four living sisters, of whom Ann P. Weaver was one, and descendants of a deceased sister, Mrs. Goff, namely four living daughters, and Bat Smith Lucy, son and only descendant of another daughter of Mrs. Goff, who had also died in the lifetime of the testator. The said Virgil H. and his four living sisters were each entitled to one sixth of the estate, and the descendants of Mrs. Goff—her four living daughters and Bat Smith Lucy—were entitled to share equally in the remaining sixth. There were, therefore, ten heirs, entitled to share in the estate; five full heirs, and five sub-heirs entitled collectively to the sixth of the estate. Bat Smith Lucy died before the present suit was instituted, childless and unmarried, leaving a will, valid as to personalty, but invalid as to realty, and appointing one Binford as executor. The will was probated and Binford qualified as executor. Florence Randolph, Helen Garner, Louisa Burton, and Elizabeth Nance, maternal aunts of said Bat Smith Lucy, were his heirs at law, so far as we are informed. Pending the present suit Binford died, and A. V. Gardner was administrator of said Lucy's estate when the decree was rendered.

The proceedings in the Probate Court, the sale under the order there obtained, report and confirmation of sale, and all proceedings thereafter taken in that court and pursuant to its orders, each and all failed to divest the legal title out of the heirs of Garland T. Gardner, for the reason that the purchase money had not been paid in full.—Code of 1876, § 2468; *Wood v. Sullens*, 44 Ala. 686; *Corbitt v. Chenny*, 51 Ala. 480; *Ketchum v. Creagh*, 52 Ala. 224; *Cruikshank v. Luttrell*, 67 Ala. 318. The successful maintenance of the present suit is proof conclusive that the title had not been divested; for if it had been, this suit must have failed.

The legal title to the lands remaining in the heirs of Garland T. Gardner, in a suit like the present one to enforce the vendor's lien for unpaid purchase money, it was necessary to have all in whom the legal title had vested, before the court. The brother, Virgil H. Gardner, the four living sisters, and the four living children of the deceased sister, Mrs. Goff, were each and all made defendants to the bill. This brought in the entire legal title, if Bat Smith Lucy's four living aunts were and are his next of kin, and only next of kin. It is averred and not denied that Bat Smith Lucy had neither child, brother or sister, father or mother, nor maternal grandmother living.

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It is not averred that he had no grandfather nor paternal grandmother. It is not averred that he had no paternal uncles or aunts, and it is not averred nor shown that his four maternal aunts are his only next of kin.—Code of 1876, § 2252; *Delanny v. Walker*, 9 Por. 697. This point, however, is not raised by the assignments of error, and it is not our purpose to make it a subject of reversal or ruling. We only refer to it that, if necessary, it may be looked to and considered in the final disposition of Bat Smith Lucy's share of the fund.

In taking the account, it was ascertained, reported, and the report confirmed, showing that Virgil H. Gardner, three of his living sisters, and two of Mrs. Goff's living daughters had been paid in full their share of the proceeds of the lands, the subject of this suit. It was also ascertained, reported, report disaffirmed in part, and decreed that Binford, executor of Bat Smith Lucy, had received a large part of the share of the land money to which he was entitled, leaving a very small sum to be paid to Lucy's representative. Whether such payment was in fact made to Binford was one of the contested questions in this cause, and is the main basis of the errors assigned in this court.

Not until January 7, 1885, was the personal representative of Bat Smith Lucy made a party in this cause, and it was done then in response to a petition filed by him, praying to be made a party. This was after the main litigation had been had, after the testimony had been taken and published, after the controlling legal principles had been settled by decrees, after the register had held his reference, examined testimony, and had made his report as to the final distribution of the fund. It was the last day but one before the final decree was rendered, from which this appeal is prosecuted, mainly in the Lucy interest.

It is manifest that Lucy's personal representative was a necessary party in taking the account of alleged distributions made to him, and the omission to have him before the court renders it necessary to reverse the decree of the chancellor. *Blackwell v. Blackwell*, 33 Ala. 57; *Wallace v. Nichols*, 56 Ala. 321; *Watson v. Oates*, 58 Ala. 647; *Dooley v. Villalonga*, 61 Ala. 129; *Bell v. Hall*, 76 Ala. 546.

In what is said last above, it is not our intention to affirm that in ruling as to the alleged payment made to Binford, the chancellor erred in weighing the testimony before him. We reverse on this point, solely on the ground that Bat Smith Lucy's representative had not the opportunity to cross-examine witnesses, and to introduce testimony, if he chose to do so.

The present bill was filed for the single purpose of enforcing a vendor's lien. It was filed and prosecuted to a final de-

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cree in the name of the personal representative—administrator *de bonis non*—of Garland T. Gardner, the testator; and claims and obtains relief solely in complainant's representative capacity. The sole purpose apparent on the face of the proceedings was and is the reduction of the proceeds of the land to the possession of the administrator, as assets of the estate. It is not shown that Virgil H. Gardner, or his estate, has ever been brought to a settlement of his administration, nor is it shown how his accounts would stand, if his administration were brought to a settlement. It is averred in some of the pleadings that the partial distributions made by him were unequal, but in none of the testimony, accounts and findings of the register, or decretal orders of the chancellor, is that subject alluded to. It is manifest that any distribution of the land money, without any reference to prior, partial distributions, might operate very unequally, and unjustly to some of the next of kin. The final decree rendered in this cause was, in effect, a final settlement of the administration *de bonis non*, and it was made without either pleadings, proceedings, or even motion to have the settlement transferred to the Chancery Court. There was no account current filed, nor required to be filed, and no steps were taken looking to a settlement. We think it would establish a new and dangerous precedent to allow a settlement, made as this was, to stand.—*Worthy v. Lyon*, 18 Ala. 784; 1 Brick. Dig. 649, § 143; 3 *Id.* 337; §§ 90, 91. It should, however, be borne in mind, that the personal representative can not himself procure the removal of his settlement into the Chancery Court, without special equitable reasons.—1 Brick. Dig. 648, § 128; 1 *Id.* 334, § 65.

The effect of what we have declared is, that nothing which has been done is binding on the estate or heirs of Bat Smith Lucy, and that the decree of distribution stands for nothing.

Reversed and remanded.

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Bill in Equity for Specific Performance.

1. *Application of payments.*—When several debts are due by a debtor to one creditor, and he makes a partial payment, he may direct to which debt it shall be applied, unless there is some particular relation, legal or contractual, which denies him this right of election; and if, having this right of election, he makes a partial payment without di-

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recting its particular application, the creditor may at once make the application, but not to a debt or liability not yet due.

2. *Partnership accounts; when liability between them matures.*—Where the vendor and purchaser of land, while the purchase-money is due and unpaid, enter into a partnership venture for getting out, rafting and selling timber, the purchaser agreeing to superintend the work, while the vendor paid for provisions and labor, and the net profits and losses were to be provided between them; until the timber is rafted and sold, and the net profits or losses ascertained, there is no debt or liability due from the purchaser to the vendor, to which the latter can apply a partial payment.

3. *Conclusiveness of judgment.*—The purchaser having brought an action at law against his vendor, alleging full payment of purchase-money and the failure or refusal of the vendor to make titles according to the condition of his bond, and judgment on verdict being rendered for the defendant; while such judgment is not conclusive as to the amount due, it is conclusive of the fact that something is due; and on bill afterwards filed by the purchaser to compel a specific performance, alleging full payment of the purchase-money, while the judgment at law is unreversed and in full force, although the evidence adduced before the register may show full payment before the judgment was rendered, he must report that a nominal sum was due.

APPEAL from Butler Chancery Court.

Heard before the Hon. JNO. A. FOSTER.

The opinion states the facts.

GAMBLE & RICHARDSON, for appellants.

STALLINGS & WILKINSON, *contra*.

STONE, C. J.—In May, 1881, Pulaski purchased from Heard two hundred and forty acres of land, at the agreed price of three hundred and sixty dollars, secured by note, due in October, 1881. Heard gave Pulaski an obligation to make title when the purchase-money should be paid, and authorized him to go into immediate possession. The present suit is a bill by Pulaski to enforce specific performance of the contract, alleges full payment of the purchase-money, and offers to pay any balance, should an unpaid balance be found. The answer denies payment, and claims that there is a considerable balance unpaid. Much testimony was taken, and it is greatly in conflict. The chancellor decreed that the complainant was entitled to relief, and he ordered a reference and report to ascertain whether the purchase-money had been paid; and if not in full, to what extent it had been paid. The error complained of, questions the propriety of the rules declared for taking the account.

It is among the uncontroverted questions in this case, that in the winter of 1881–82, a lot of timber was sold, gotten out by Pulaski, from which Heard realized on March 6, 1882, five hundred and twenty 70-100 dollars. This money, Pulaski con-

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tends, paid the purchase-money of the lands, some other charges which were rightly taken out of it by Heard, and left a balance due to Pulaski of twenty dollars. Heard contends that other claims he sets up against Pulaski should also be deducted from the money, before any credit from that source should be entered on the land note.

The rules for applying payments, where the same debtor owes more than one debt, are too well settled to admit of further dispute. The paying debtor may, at the time of payment, direct to which debt it shall be applied, and his direction must be obeyed, unless there is some relation, legal or contractual, between the debt and the payment which denies to the debtor this right of election. The paying debtor failing to declare an election, the receiving creditor may elect to which debt the payment shall be applied, provided, that election is made on receipt of the payment. But this right of election and application by the creditor can not be so exercised, as to apply the payment to a debt or liability not due.—*Bobe v. Stickney*, 36 Ala. 482; *Robinson v. Allison*, *Ib.* 525; *Aderholt v. Embry*, 78 Ala. 158; *Johnson v. Thomas*, 77 Ala. 367; *Taylor v. Cockrell*, (in MS.) Ala.

Another important element enters into the decision of this case, presented in the testimony, and noticed by the chancellor in his decree. The cross demand of five hundred and twenty 70-100 dollars, relied on by Pulaski as payment of the land note, grew out of individual dealings between him and Heard. It had nothing to do with any partnership, or joint adventure between them. Separate and apart from this transaction, in the winter of 1881-82, Pulaski and Heard entered into a joint adventure, by which they agreed to get out, raft, and sell other timbers in partnership. Pulaski was to superintend the getting out and rafting of the timbers, Heard was to make advances in provisions and to pay for labor, and after paying all expenses attending the adventure, the net profits or losses were to be borne equally by the two co-partners. Work was commenced, and continued for several months. The testimony tends to show that Heard commenced making advances for the joint adventure in January, 1882, and that he continued to do so into the summer. This adventure was closed up about the winter of 1882-83, and resulted in a serious loss. Before March 6, 1882, when Heard received the five hundred and twenty 70-100 dollars, he claims to have expended considerable sums of money on account of the partnership; and that Pulaski being bound to make good to him one-half of the losses of the partnership, this would swell the indebtedness of Pulaski to him on March 6, 1882, by one-half the sum thus expended. Adding this to the five hundred dollars admitted by

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Pulaski to be due to him (including the land note), he claims that a much larger sum was due him on March 6, 1882, than the proceeds of the timber, paid to him on that day.

The timber gotten out in the partnership enterprise was not sold until in the fall or winter of 1882-83. Till then the mutual liabilities of the partners, one to the other, had not matured into a debt or legal liability; and it could not do so until the adventure was completed, and the profit or loss ascertained. We agree with the chancellor, that on March 6, 1882, no debt had arisen from Pulaski to Heard on the partnership account, which would authorize the latter to apply any part of the five hundred and twenty 70-100 dollars to its extinguishment, without the consent of Pulaski.

Before the present bill was filed, Pulaski had instituted suit against Heard, alleging that he had made full payment for the land, and that Heard had refused to make him title—thus committing a breach of his bond. The issue in the cause was whether or not full payment had been made. There were verdict and judgment for defendant, which remain in full force. This was, and is, a conclusive determination that some part of the purchase-money of the land was unpaid. It is no determination of the amount that was unpaid. If the report of the register ascertains that nothing was due on the lands, he must still report that a nominal sum was due. Unlike a single judgment in an action of ejectment (*Boyle v. Wallace*, in MS. Ala.), the judgment in the suit on the bond is conclusive between these parties that something was due.—2 Brick. Dig. 145, § 205.

We have not inquired whether the decree in this case was final.

There is no error in the record of which appellants can complain.

Affirmed.

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Action for Damages by Administratrix Under Section 2641 of Code (1876).

1. When action lies generally; contributory negligence as defense. The statute which gives an action for damages to the personal representative of a deceased person, whose death was "caused by the wrongful act or omission of another," is limited to cases in which the deceased person himself, if death had not ensued, might have maintained

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an action for the same act or omission (Code, § 2641); and since contributory negligence on the part of the deceased would have been a complete defense to an action by him, it is equally a defense to an action by his personal representative.

2. *Same; retailer selling or giving liquor to intoxicated person, resulting in death.*—Although a retailer of spirituous liquors, who sells or gives liquor to an intoxicated person, known to him to be a person of intemperate habits is guilty of a misdemeanor, (Code, § 4205); yet he is not liable to a statutory action at the suit of the personal representative, though death ensued immediately after the liquor was drank, since the act of selling or giving the liquor is not the immediate cause of the death; and if that act were within the purview of the statute, the contributory negligence of the decedent himself would be a defense to the action.

APPEAL from Colbert Circuit Court.

Tried before Hon. H. C. SPEAKE.

This action was brought in July, 1885, by Susan C. King, the widow and administratrix of James L. King, deceased, against Benjamin Henkie, William Wilson and Clarence Doss, the former of whom was the proprietor, the two latter being his clerks and employees, of a bar room, or drinking saloon in the city of Tuscumbia in said county. The complaint averred that on June 23, 1885, the plaintiff's intestate, the said James L. King, "was in the city of Tuscumbia in a state of intoxication, so much so as to be utterly incapable of taking care of himself, and in such helpless condition he walked or staggered into a saloon or grocery, on Commercial Row, in said city of Tuscumbia, in which house the defendants were engaged in selling and giving away spirituous liquors; and, although they saw and knew that the plaintiff's intestate, when he came into said saloon or grocery on said day, was in a helpless state of intoxication; and, although they knew he was a man of known intemperate habits, which was evidenced by his then condition, and although they knew he was the support of wife and children, yet the defendants wrongfully, and in violation of law, furnished, gave and sold to the plaintiff's intestate a large quantity of intoxicating liquors which he drank, and which caused the death of plaintiff's intestate before he left said saloon or grocery." The complaint was subsequently amended so as to make it appear that Henkie was "a licensed retailer of intoxicating liquors of all kinds, and the other defendants were his agents;" and to include the additional averment that said King, on the day of his death, and before he went into defendants' saloon was "in a helpless state of intoxication, destitute of sense and reason, his sense and reason being overthrown by the use of intoxicating liquors, and his mental faculties thereby so impaired that he did not know what he was doing, and incapable of knowing what he did, and incapable of consenting to anything; and in this condition of helplessness and mental

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darkness, the defendants, then and there, knowing his mental condition, his want of mental power to consent to anything, or to know what he was doing, furnished him with intoxicating liquors, which he drank, and which caused the death of plaintiff's intestate before he left said saloon, and in less than an hour."

To the complaint, as amended, the defendants severally demurred; assigning, among others, as grounds of demurrer: (1). That said complaint contained no averment that plaintiff's decedent, the said King, could have maintained an action against the defendants for the acts or omissions complained of had the same failed to produce death. (2). That said complaint fails to aver any wrongful act or omission on the part of the defendants which caused the death of said King. (3). That said complaint showed on its face that the alleged act of the defendants did not produce the injury complained of, but that plaintiff's intestate "produced it himself in this: that he drank a large quantity of intoxicating liquors which caused his death." (4). That said complaint showed on its face that the deceased contributed proximately to his own injury, and was guilty of contributory negligence by becoming intoxicated and "utterly incapable of taking care of himself," as therein averred.

The action of the court in sustaining the demurrer is here assigned as error.

J. B. MOORE and J. T. KIRK, for appellant, made the following points: (1). The contention of appellees that the plaintiff's intestate, if death had not ensued, could not have maintained an action for injuries sustained by reason of the act complained of, does not present the proper test as to appellant's right to maintain the present action. It is the character of the act, not the person by whom the suit can be maintained, that is the object of the statute.—*S. & N. R. R. v. Sullivan*, 59 Ala. 272; *Phila., Wilmington R. R. Co. v. The State*, 58 Md. (2). Appellant's intestate, in his drunken condition was, mentally, in the state of an infant or person *non compos*, and therefore incapable of consent or contributory negligence.—*Sher. & Red. on Neg. § 26, n. 2*; *Wharton on Neg. 325*; *M. & M. R. R. v. Blakeley*, 59 Ala. 471; *Tanner's Err. v. L. & N. R. R.*, 60 Ala. 178; 18 N. Y. 248; 9 Por. 336; 3 Ohio 172; 27 Conn. 393; 50 Mo. 464; 53 Md. 542. (3). A case very similar to the present is *McCue v. Klein*, 60 Texas 168, 48 Am. Rep. 260, arising under the Texas statute which is much like our own. (4). The defendant, Henkie, was a licensed retailer, and his co-defendants were each his employees. Each violated the law in supplying the deceased, a man of known intemperate habits, with liquor.—128 Mass. 289; 36 Ala. 345. (5).

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See, generally, the following authorities:—Wharton Neg. § 443; Sher. & Redf. §§ 484 and 485, note 2; 9 Nebraska 304; 50 Iowa 34; 26 Hu. N. Y. 608; 15 Neb. 150; 24 Kansas 147; 34 Ohio St. 399; 128 Mass. 289; 41 Mich. 475; 133 Mass. 86; 20 Kansas 109; 6 New York 376; 93 Mass. 514; 104 Mass. 64; 106 Mass. 143; 96 Mass. 290; Beach on Contributory Negligence, 204–391, 395–6–7.

WM. COOPER and JAMES JACKSON, *contra*.

SOMERVILLE, J.—The question raised for our decision, by the ruling of the court below on the demurrer to the complaint, is, whether, under the provisions of section 2641 of the present Code, 1876, authorizing an action to be brought for a wrongful act or omission causing the death of another, the personal representative of the deceased person can maintain an action against a retailer of intoxicating liquors, who sells or gives them to a man of known intemperate habits, who is helplessly drunk at the time, the drinking of which causes his death almost instantaneously.

1. The statute, under which the action is brought, provides that “when the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action against the latter at any time within two years thereafter, *if the former could have maintained an action against the latter for the same act or omission, had it failed to produce death*, and may recover such sum as the jury deem just.” The remainder of the section, providing how the amount shall be distributed, and for the survival of the action against the personal representative of the wrongdoer, does not affect the question under consideration, and need not therefore be particularly referred to by us.—Code, 1876, § 2641.

The selling or giving away of spirituous, vinous, or malt liquors, in any quantities whatever, to persons of known intemperate habits except upon the requisition of a physician for medicinal purposes, is in this State made a misdemeanor, and a license to sell or retail affords no protection to the guilty party.—Code, 1876, § 4205.

The foregoing section of our Code (§ 2641), like many similar statutes in other American States, was evidently modelled after what is commonly known in England as Lord CAMPBELL'S Act, 9 and 10 Vict. c. 93, enacted by the British Parliament in the year 1846. The language there used was that “whenever the death of a person shall be caused by (any) wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in

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respect thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

2. The purpose of this, and like legislation, was clearly to correct a defect of the common law, by a rule of which it was well settled, that a right of action based on a tort or injury to the person, died with the person injured. Under the maxim, "*Actio personalis moritur cum persona*," the personal representative of a deceased person could maintain no action for loss or damage resulting from his death.—*Hallenbeck v. Berkshire, R. R. Co.*, 9 Cush. 480; *Quinn v. Moore*, 15 N. Y. 436. The reason for the rule was said by Baron Parke, in a case arising before him under the English statute, to be, that in the eye of the common law "the value of life was so great as to be incapable of being estimated by money." The rule probably, however, rests on a broader basis.

3. These statutes, it will be observed, each give a right of action only in cases where the deceased himself, if the injury had not resulted in his death, might have sustained a recovery. They continue, in other words, for the benefit of specific distributees "a right of action which, at the common law, would have terminated at the death, and enlarge its scope to embrace the injury resulting from the death." Cooley on Torts, 264.

4. The condition that the action must be one which could have been maintained by the deceased had it failed to produce death, or had not death ensued, has no reference to the nature of the loss or injury sustained, or the person entitled to recover, but to the circumstances attending the injury, and the nature of the wrongful act or omission which is made the basis of the action.—Saunders on Negligence, 219; *South & North Ala. R. R. Co. v. Sullivan*, 59 Ala. 272, 281; As said in *Whitford v. The Panama R. R. Co.* 23 N. Y. 465, where a similar phrase in the New York statutes was construed, it "is inserted solely for the purpose of defining the kind and degrees of delinquency with which the defendant must be chargeable in order to subject him to the action."

5. It necessarily follows, and has been accordingly decided with great uniformity by the courts, that where the negligence of the person killed has contributed proximately to the fatal injury, no action can be maintained by his personal representative under this statute, because the deceased himself would not have been entitled to recover had the injury not proved fatal.—Cooley on Torts, 364; Saunders on Neg., 215; 1 Anderson on Torts (Wood's Ed.) p. 621, § 575; *Savannah & Memphis R. R. Co. v. Shearer*, 58 Ala. 672.

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6. We first observe, that the cause made by the complaint does not seem to us to fall within the letter or spirit of the statute, and the court below so decided on the demurrer. The death of the deceased was not "caused" so much by the wrongful act of the defendants in selling him whiskey, as by his own act in drinking it after being sold to him. The only wrongful act imputed to the defendants was the selling, or giving, as the case may be, of intoxicating liquors to the deceased while he was in a stupidly drunken condition, knowing that he was a man of intemperate habits. It is not shown that the defendants used any duress, deception, or arts of persuasion to induce the drinking of the liquor. The act, however, as we have said, was a statutory misdemeanor. But this was only the remote, not the proximate or intermediate, cause of the death of plaintiff's intestate. The rule is fully settled to be that "if an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some *intervening cause*, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote."—Cooley on Torts, 68–69; 1 Anderson on Torts, 12–13; §§ 10–11. The statute under consideration was not intended to annul, but rather to preserve this rule of the common law, so necessary to the certainty and justice of its administration, that there must be some proximate connection between the wrong done and the damage claimed to result from it, that the two must be sufficiently conjoined so as to be "concatenated as cause and effect," as often said. Had it not been for the drinking of the liquor, after the sale, which was a secondary or intervening cause co-operating to produce the fatal result, and was the act of deceased, not of defendants, the sale itself would have proved entirely harmless. Hence it can not be said that the wrongful act of the defendants, in making sale of the liquor, caused the death of King; but rather his own act in drinking it. And this must be true, whatever the condition of his mind, or state of his intellect, and without regard to the question of any contributory negligence on his part. The case, we repeat, is one not covered by the statute.

7. The plaintiff is, moreover, in our opinion, debarred from recovery by the contributory negligence of the deceased, even admitting that the wrongful act of the defendants caused the death of King. It is shown that the deceased was helplessly drunk when he purchased and drank the liquor, so much so as to render the exercise of ordinary care by him impracticable, if not impossible. The presumption is that this condition was brought about by his own voluntary or negligent act, by the

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persuasion or coercion of another. If we admit that the State of mind thus produced was analogous to that of one *non compos*, or insane, so that the deceased was in mental darkness and so unconscious as to be at the moment incapable of knowledge or consent, thus rendering him morally unaccountable, yet the fact confronts us that this condition was the result of his own negligence or wantonness, and without it the accident of his death would not probably have occurred. The deceased, by the exercise of ordinary care, might have escaped making himself helplessly drunk. By not doing so he was the author of his own death, in view of the fact that it does not appear that the defendants, after the fatal draught was taken, could by the exercise of ordinary care, or even by any practicable means at hand, have avoided the consequences of death which almost instantly followed. This involved every element of contributory negligence, and was sufficient to prevent a recovery by the deceased, had death not ensued.—Railway Accident Law, (Patterson), 74; *Illinois Cen. R. R. Co. v. Cragen*, 71 Ill. 177; *Cramer v. Burlington*, 42 Iowa, 315; Whart. on Neg. § 332.

8. We have thus hypothetically admitted the contention of appellant's counsel that one drunk to unconsciousness is to be placed upon the same ground as infants of tender years, persons *non compos*, or insane, so far as concerns the question of plaintiff's contributory negligence. The contrary of this, however, would seem to be true, as the basis of the rule governing the latter classes is that of moral accountability. Imbeciles, lunatics, and infants are not accountable morally for the state of their minds, and yet the law governing the subject of contributory negligence, even as applicable to them, is admitted to be in a very unsatisfactory and doubtful state. Cooley on Torts, 680, 682. A drunkard, or one in a state of voluntary intoxication, can scarcely claim so much charity from the law in this particular as imbeciles and lunatics, because he has by his own agency, either wantonly or negligently, brought about his own misfortune. As drunkenness is no excuse for crimes, or for torts, no more should it be a basis for the liability of another in an action brought against him by the victim of such inebriety.

9. The case of *McCue v. Klein*, (60 Tex. 168), s. c. 48 Amer. 260, referred to by appellant's counsel as an authority to support the present action, although analogous to it in some respects, is broadly distinguishable from it in one important particular. There the death of the deceased was brought about by the defendants' conspiring together to induce and persuade the deceased to swallow a large amount of whiskey, he being already so drunk as to be deprived of

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his reason and to be rendered incapable of resistance, the draught being thus imposed upon him in his helpless condition. The case was made to rest on the ground that the administration of the deadly draught, like that of a noxious drug, was an assault, the deception by which it was accomplished being a fraud on the party's will, equivalent to force in overpowering it.—*Com. v. Stratton*, (114 Mass. 303) 19 Amer. Rep. 330.

The demurrer to the complaint was, for the foregoing reasons, properly sustained, and the judgment of the Circuit Court must be affirmed.

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Action on Promissory Note.

1. *In what county action must be brought; who is householder.*—An unmarried man, who rents and occupies a room as a sleeping apartment, taking his meals elsewhere in the city or town, is not a householder within the meaning of the statute (Code, §§ 2928), which prohibits an action against a freeholder except in the county of his residence.

2. *Proof of loss of note.*—In an action on a promissory note, secondary evidence of its contents may be received, on the testimony of the plaintiff that he had not seen it since it was used in a former chancery suit, proof of search by his solicitor in that suit among his papers, and by the register in chancery of search among the papers on file in his office.

APPEAL from the City Court of Selma.

Tried before Hon. JON. HARALSON.

This was a suit by Solomon Lehman on a promissory note executed to him by Edward Kahn and Alexander Katzenberg, as partners comprising the mercantile firm of Ed. Kahn & Co., and was commenced in August, 1884. The note sued on bore date of 30th November, 1878, and became due and payable on 1st November, 1879. Service of the summons and complaint was had on 24th November, 1884, on said Katzenberg, in Wilcox county, with a return of not found as to Kahn, on whom service was never perfected, for reasons hereinafter indicated, and against whom the suit was finally discontinued. On the trial, as shown by the record, the defendant, Katzenberg, filed a plea in abatement, averring, in substance, that he was a householder in the county of Wilcox, in this State, and that his co-defendant, Kahn, was a non-resident of the State of Alabama,

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having, at the time of the issuance of the summons and complaint and for several years prior thereto, a permanent residence and domicile in the State of Pennsylvania. The evidence adduced in relation to this plea, a demurrer to which was overruled by the court, showed that said Katzenberg had, for several years previous to the beginning of the suit, lived in Camden, in said county of Wilcox, where he had charge, as "agent," of a stock of merchandise, the name of his principal not being indicated by the record; that he was unmarried; that he had sleeping apartments over, or contiguous to his place of business; and that he took his meals elsewhere, at a designated place. On this evidence the court, before whom the cause was tried without the intervention of a jury, found the issue in favor of the plaintiff and the defendant pleaded the general issue.

The plaintiff proposed, as shown by the bill of exceptions, to introduce in evidence the affidavit of Joseph F. Johnston, formerly a practicing attorney of the Selma bar, touching the loss of the note and the mortgage securing it. The court refusing, upon the objection of the defendant, to admit the affidavit, the plaintiff introduced as a witness W. R. Nelson, who testified that he was the law partner of said Johnston (who had professional charge of the note), and had been for more than a year; that said Johnston, who had removed from Selma, had not carried away the papers in question, and witness prosecuted a thorough search for them in his office, and also in the office of the register in chancery of Dallas county, the missing papers having been used as evidence in a cause pending in the Chancery Court; that witness had never seen the papers, and could not swear, of his own knowledge, that Johnston had ever had them, &c. The plaintiff also introduced as witnesses the register in chancery and the plaintiff, Lehman, who testified as to the details of searches made by them respectively for said note and mortgage. Upon this testimony the court permitted the introduction of secondary evidence as to the contents of said note, against the objection and exception of the defendant.

The record further shows that on June 13, 1886, the plaintiff moved the court (the judgment in his favor not having been entered up at the preceding term of the court) "to enter up a verdict and a judgment *nunc pro tunc* for the plaintiff in this case against Alexander S. Katzenberg, as of the 5th day of March, 1886, the day when the same was rendered at the former term of this court;" and to "enter up the order *nunc pro tunc* for the issuance of an execution, which order was made at the last term of this court but not entered up"—which motion was granted by the court, and judgment *nunc pro tunc* rendered accordingly.

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No assignment of error appears upon the record.

CUMMINGS & MILLER, and H. S. D. MALLORY, for appellant.

BROOKS & ROY, *contra*.

CLOPTON, J.—The word householder, as used in the statute defining the qualifications of jurors, has received an adjudged meaning—the occupier of a house, being the head or master, and having and providing for a household. “It implies in its term the idea of a domestic establishment—of the management of a household.”—*Aaron v. The State*, 37 Ala. 106. We discover nothing to authorize an inference, that the term is used in any other, or more enlarged sense in section 2928 of the Code (1876), providing that no freeholder or householder, having a permanent residence within the State, shall be sued out of the county of his residence. An unmarried man, occupying a house, employing his own servants, and providing for the household as constituted, may be a householder; but an unmarried man, who rents and occupies a room as a sleeping apartment, and takes his meals elsewhere, is not a householder in the meaning of the statute.

The search for the note and mortgage appears to have been made in good faith. They were delivered by the plaintiff to his attorney, Johnston, in 1878, to be used in a chancery suit then pending, and plaintiff testifies that he has not had possession of them since. Search was made in the register’s office without success. The law office of Johnston is still occupied by his then partner, with whom he left the papers connected with his business, except two or three, which he carried with him, but the note and mortgage were not of those taken away. The office was diligently and persistently searched by the person having the charge of, and access to the papers in the place to which the note and mortgage were last traced; and there does not appear to be any probable motive for withholding the papers. A sufficient predicate was laid to let in secondary evidence of the contents of the note and mortgage.—*Jernigan v. The State*, (in MS).

The entry of judgment *nunc pro tunc* recites, that the parties came by their attorneys, which dispenses with personal notice, and that “the plaintiff introduced in evidence the findings of the court and the entries made by the court in this case at the last term; and such evidence having been inspected and considered, the court is satisfied, that the same establishes sufficient ground for granting the motion.” The record does not show what are the contents of the findings of the court and of the entries made. In the absence of such evidence, we

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must presume, that they were competent and sufficient to authorize the court to make the order.—*Allen v. Bradford*, 3 Ala. 281; *Farmer v. Wilson*, 34 Ala. 75; *Whitten v. Graves*, 40 Ala. 578.

Affirmed.

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Action for Damages Against Sheriff and Sureties on Official Bond.

1. *Sale of partnership's entire stock by one partner.*—The principle is settled, that a sale of all the goods of a mercantile partnership at once is in the course of trade, and a fair sale of all by a single contract by one partner is within the implied powers incident to the partnership relation.

2. *Same; remedies of other partner, or of creditors.*—Fair dealing between partners requires that, before one undertakes to sell the entire stock, either for cash or in payment of a debt, he should consult the other, if conveniently accessible, no sudden, imperative exigency arising; the other may protect himself by forbidding the sale, or dissenting before it is complete; and if it is consummated without notice to him, and works any wrong or injury to him, he may obtain relief in equity; but if he acquiesces in it, or declines to dissent and enforce his equitable rights, a partnership creditor can not assail it except on grounds which would avoid a sale by the partnership.

3. *Same; conditional sale and subsequent assent or ratification by other partner.*—If the sale was made subject to the condition that the other partner should assent to it, his assent or subsequent ratification must be shown; but such assent or ratification may be either express or implied, and is a question for the jury, to be determined by a consideration of all the circumstances in evidence.

4. *Burden of proof as to consideration; charge misplacing burden of proof.*—When an attachment is levied by a creditor on goods claimed by a purchaser from his debtor, and his debt antedates the sale or conveyance, the *onus* is on the purchaser to prove the consideration paid by him; but, when the record shows that this was proved, and there was no conflicting evidence, a charge misplacing the burden of proof is error without injury.

5. *Measure of damages.*—In an action against a sheriff and his sureties, for levying an attachment against a third person on plaintiff's goods, there being no aggravating circumstances, the measure of damages is the value of the goods at the time they were taken, with interest to the day of the trial.

6. *Transfer of goods after levy.*—If the goods belonged to plaintiff, and were in his possession at the time the attachment was levied on them, his subsequent sale of them to a third person does not affect his right of action for the wrongful act.

APPEAL from the Circuit Court of Conecuh.

Tried before the Hon. JOHN P. HUBBARD.

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This action was brought by J. H. Allen, J. C. Bush and T. H. West, as partners under the firm name of Allen, Bush & West, against James E. Ellis, the sheriff of Conecuh county, and the sureties on his official bond, in which the plaintiffs seek to recover damages of the defendants for the alleged wrongful conduct of the sheriff in levying an attachment against Cooper & Herrington on goods belonging to plaintiffs. The record discloses that said Cooper & Herrington, merchants in Evergreen, Ala., were largely indebted to plaintiffs and to other creditors; that Herrington went to Mobile, and while there sold out all the partnership business of Cooper & Herrington to plaintiffs, without the knowledge or consent of his partner at Evergreen, in satisfaction of the debt of Cooper & Herrington to plaintiffs. There was a conflict of evidence on the trial of the cause as to whether Cooper subsequently ratified and assented to the sale made by Herrington. While the goods purchased by plaintiffs were in their possession they were levied on by the sheriff under a writ of attachment issued in favor of Mack, Stadler & Co. against Cooper & Herrington, and subsequent to this levy plaintiffs sold the goods to Bush & Finch. It was contented by defendants that this sale of Allen, Bush & West to Bush & Finch divested plaintiffs of all interest in the property, and that they were, therefore, without authority to bring this suit. A charge requested by the defendants in enforcement of this proposition was refused by the court. This action of the court, with a number of other grounds are assigned as error, on appeal.

RICE & WILEY and BOWLES & RABB, for appellants.—(No brief came into the hands of the Reporter.)

J. M. MCKLEROY and STALLINGS & BURNETT, *contra*.—It is competent for one partner to dispose of the partnership funds as he pleases, so long as he is guilty of no fraud.—*Sadler et al. v. Robinson's Heirs*, 2 Stew. 520. It is shown by the record that Cooper & Herrington owed Allen, West & Bush more than the stock of goods and business sold them, was worth, and that it was in payment of this debt, without reservation of any interest to Cooper & Herrington. It is the right of each partner to have the partnership property applied to the payment of partnership debts.—*Donelson's Adm'r v. Posey et al.*, 13 Ala. 752. If Cooper did not join in the bill of sale, he subsequently ratified what Herrington had done by recommending a suitable person to put in charge of the store, and by assigning the fire insurance policies to the transferees. The measure of damages was the highest value of the goods from the time of the commission of the tort by the sheriff, and the failure of the

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court to allow appellants to show the value of the goods at the time of the trial was not error. The sale of Allen, Bush & West to Bush & Finch can not affect the right of appellees to recover. Allen, Bush & West were only prevented from delivering the possession of the goods sold to Bush & Finch by the wrongful conduct of the sheriff in seizing the goods and keeping them in his possession.

CLOPTON, J.—The material question in this case relates to the validity of a sale of the stock of goods and store fixtures and furniture of the partnership of Cooper & Herrington. Allen, Bush & West, who are the plaintiffs, were merchants in Mobile and creditors of Cooper & Herrington. On a visit to Mobile, to which place he went for the avowed purpose of procuring money to pay creditors, who were pressing the payment of their claims, Herrington, on demand of the plaintiffs, sold them the entire stock of merchandise in part payment of their debt, without having consulted the other partner, who was then in Evergreen, the place of business. Had the sale been made by both partners, or by one with the consent of the other, in payment of an honest debt at a fair valuation of the property, without the reservation of a benefit, there would be no doubt of its validity, though it operated to exclude other creditors. The question, to what extent, and in what manner, one partner may bind the firm by a disposition of the partnership property, without the knowledge or consent of his co-partner, though examined and considered in many cases, has not been generally and conclusively settled in this country. The opinions and decisions of learned and eminent jurists are inharmonious. The question has most frequently arisen in cases of general assignments; and different authorities have based their affirmance or denial of the power on different grounds. Whether or not one partner may make a valid general assignment of the partnership property without the knowledge or consent of the other partner, and if so, of what character, and under what circumstances, it is unnecessary for us to decide. The present case involves a *sale*, and to this question we confine this opinion.

It is contended, that Cooper being accessible and capable of assenting and dissenting, Herrington had no authority to make the sale in Mobile without first consulting his co-partner. Conceding that he could sell by retail, it is insisted, that a sale of the entire stock to one creditor is an act out of the course of business, and without the scope of the partnership. The articles of co-partnership are not before us, and in their absence we must assume that each of the partners had the implied powers incident to the relation. The general power to sell is not restricted to the ordinary business of the partner-

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ship of selling by retail goods purchased in large quantities. A principal purpose being to sell, if one partner has the power to sell the entire stock in small quantities, there seems to be no good reason, why he has not power to sell in large quantities or the whole at once, if there be occasion and opportunity. MARSHALL, C. J., speaking of a conveyance by one partner for the benefit of creditors, says: "Had this, then, been a sale for money, or on credit, no person, I think, could have doubted its obligation. I can perceive no distinction in law, in reason, or in justice, between such a sale and the transaction which has taken place. A merchant may rightfully sell to his creditor, as well as for money. He may give goods in payment of a debt. If he may thus pay a creditor, he may thus pay a large one. The *quantum* of debt, or of goods sold, can not alter the right."—*Anderson v. Thompson*, 1 Brock. C. C. 456; *Arnold v. Brown*, 24 Pick. 89; *Whitton v. Smith*, 1 Freem. Ch. R. 231; Burr. on Ass'g't. 103.

Either partner may apply the money of the firm to the payment of any of the firm debts. If Herrington had authority to sell the entire stock of goods at once for cash and appropriate the money to the plaintiff's debt, he has like authority to sell them the goods in payment.—In *Cullman v. Bloodgood*, 15 Ala. 34, though admitting that Mr. Justice Story concedes, "it may well admit of some doubt whether the power extends to a general assignment of all the funds and effects of the partnership by one partner for the benefit of creditors," it is substantially said, that there is no conflict in the decisions as to the right of either of the partners, before dissolution, to apply the funds of the firm to the payment of one creditor to the exclusion of another.—In *Halstead v. Shepard*, 23 Ala. 558, it is said: "In ordinary partnerships, particularly those of a mercantile character, it is undoubtedly, true that, while the partnership is subsisting, one partner, acting within the scope of the ordinary business of the firm, has the right to sell and dispose of the property of the firm to the extent of the entire stock." And in *Hyrschfelder v. Keyser*, 59 Ala. 338, a sale of partnership property, made to a creditor by one partner without the knowledge or consent of the other, was sustained; MANNING, J., approvingly quoting from Collyer on Partnership that, "it is within the general scope of partnership authority to sell and dispose of all the partnership goods in the ordinary and regular course of business. He may sell the whole stock in trade at once by a single contract." From these cases, upon which, no doubt, attorneys have advised their clients, and parties have acted, we must regard as settled law in this State, that a sale of all the goods of a mercantile partnership at once, is

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in the course of trade, and a fair sale of all by a single contract by one partner is within the implied power incident to the relation.

But just and open dealing between partners requires, that the co-partner, if conveniently accessible, and no sudden imperative exigency arises, should be consulted, before one partner undertakes to sell the entire stock, either for cash or to a creditor, in respect to which each has equal right and authority. When the power is so exercised, the transaction is, at least, open to suspicions of undue advantage.—In *Halstead v. Shepard*, *supra*, it is said: “If, therefore, one partner undertakes to dispose of the partnership effects to the injury and wrong of the other partners, equity will interpose to grant relief; and if the purchasers of such effects take them with notice of such fraudulent intent on the partner making the sale, they will be considered as parties to the fraud, and liable in equity with the fraudulent partner to refund to the remaining partners.” But, when the sale is *bona fide*, and no wrong or injury is done to the other partner, there is no ground on which to question the *power*. In case of a disposition of the property, whereby wrong or injury results to the co-partner merely, the liability is to him; and while it may be, that the firm creditors may avail themselves thereof by a proper suit in equity, having for its objects, marshalling the assets of an insolvent partnership, and subrogation to the lien and equity of the co-partner, as to which we express no opinion, a single creditor can not make available at law such wrong, unless it also constitutes a legal wrong to him as a creditor; and can not successfully avoid a sale made by one partner, when such sale, if it had been made by the firm, would not have offended his rights, the other partner acquiescing therein by declining to enforce the liability to him.

But though one partner may undertake to dispose of the partnership property, the other partner is not powerless. He may, protect himself by forbidding or dissenting before the sale is completed. The authority thus to dispose of the property rests on the rule, that each partner is the agent of the others when acting within the scope of the partnership, an implied power incident to the relation. The agency and the consequent implied power are revocable. When such authority is prohibited or qualified by the articles of co-partnership, and such stipulation is brought to the notice of the party dealing with the partner, or in the absence of such stipulation, due notice is given to such party, that the co-partner forbids or dissents—of the revocation of the agency before it is executed—such sale is not the act of, nor binding on the firm.—*Yeager v. Wallace*, 57 Penn. St. 365; *Leavitt v. Peck*,

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3 Conn. 124; *Feighey v. Sponeberger*, 5 W. and S. 564. • If it be true, as to which there seems to be no dispute, that Cooper refused to sign the conveyance or consent to the sale, when requested, its validity depends on subsequent ratification or assent.

In this connection may also be properly considered the contention of defendants, that the sale was conditional on Cooper's assent. If it be true, as to which the evidence conflicts, that Herrington refused to exercise his authority as a partner, and to make a sale without Cooper's assent, then there was no valid sale unless such consent was obtained. Whether or not the sale was absolute or conditional, and if conditional, whether or not Cooper assented, are questions of fact. The consent may be expressed or implied. Neither of the partners was examined as to these material questions, notwithstanding the plaintiff, who made the transaction, positively denied there was any condition. It was sought to overcome this denial by inferences to be drawn from circumstances. But whether the circumstances were sufficient or insufficient to disprove the statement of the witness, and to establish a conditional sale, were questions for the jury, not for the court. The court erred in not instructing the jury, as requested by defendants, that they were authorized to consider, on the question of an absolute or conditional sale, and Cooper's assent, all the circumstances occurring between the parties at the time, in connection with the testimony of the witness Bush, and the other evidence. While, it may be that if Cooper, after being fully and truly informed of the contents of the conveyance, and of the terms and character of the transaction, surrendered possession of the store and the goods, recommended a clerk, and assigned to plaintiffs the policies of insurance, this in law would be tantamount to a ratification and assent; the ascertainment of the facts should have been submitted to the jury.

The goods having belonged to Cooper & Herrington, the levy of the attachment was not wrongful and gave the plaintiffs no cause of action, unless they acquired title to the goods by a purchase valid as against the creditors of Cooper & Herrington, though the sale may not have been conditional, or it may have been ratified or assented to by Cooper. When it is shown that the attaching creditor's debt antedates the sale or conveyance, the burden is on the grantee to prove payment of an adequate and valuable consideration; in this case, the existence and validity of the debt in part payment of which the goods were taken.—*Hamilton v. Blackwell*, 60 Ala. 545. Notwithstanding, as the validity and existence of the plaintiff's debt and the adequacy of the consideration were proved by the

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witness Bush, and there was no conflicting evidence, a charge misplacing the burden of proof can not work injury, and will not of itself operate a reversal of the judgment.

The measure of damages, there being no aggravating circumstances, is the value of goods at the time they were taken, with interest to the day of the trial. There is no error in excluding evidence of the value at the time of the trial.

The attachment was levied before the sale of the goods to Bush & Finch. The goods were at the time of the seizure in the possession of plaintiffs; and if the taking was wrongful, the damage was done to them, and in them is the right of action.

Reversed and remanded.

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Bill in Equity between Purchasers at Execution Sale.

1. *Sale under power in mortgage ; purchase by mortgagee at his own sale.*—When lands are sold under a power contained in a mortgage, the sale cuts off the equity of redemption as effectually as a sale under a decree of foreclosure in equity, leaving in the mortgagor nothing but a statutory right of redemption ; but, if the mortgagee becomes the purchaser at his own sale under the mortgage, he thereby arms the mortgagor with an option, if seasonably expressed, to disaffirm the sale, without regard to its fairness, or to the adequacy of the price ; and when the sale is set aside, under bill filed within a reasonable time, the decree relates back to the day of the sale, and the parties are placed *in statu quo* as if no sale had been made.

2. *Sale of equity of redemption, under execution at law.*—An equity of redemption in lands may be sold under execution at law against the mortgagor (Code, § 3209), either before or after the law day and default, and whether the mortgagor or mortgagee is in possession.

3. *Same ; form of levy, and interest of purchaser.*—A judgment creditor of the mortgagor may levy his execution on the equity of redemption only, or on the land generally, not designating the interest of the mortgagor ; the purchaser acquiring, in the former case, only the equity of redemption, and being estopped to deny the validity of the mortgage ; and in the latter, the entire interest of the mortgagor, whether the mortgage is valid or invalid, paid or outstanding.

APPEAL from Montgomery Chancery Court.

Heard before Hon. Jno. A. FOSTER.

The original bill in this cause was filed on 21st January, 1886, by Simon Gassenheimer, administrator of the estate of Jacob Levy, deceased, against Marshall H. Molton and Mrs. A. A. Ware, the case made by the record, so far as essential to

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this report, being substantially as follows: The complainant's intestate, Jacob Levy, on 12th February, 1875, obtained a judgment in the City Court of Montgomery against the respondent, Mrs. A. A. Ware, for \$678.40; on 26th May, 1875, execution was issued on said judgment, and regularly returned "no property found;" and a number of *alias* executions were likewise issued and returned until April, 1876. In September, 1884, execution was again issued on said judgment and was placed in the hands of the sheriff, and a series of *alias* executions was regularly kept up, without the lapse of a term, until, in January, 1886, execution was again issued, placed in the hands of the sheriff, and levied by him on "the equity of redemption of Mrs. Ware, and on any interest she may have, subject to execution in the house and lot in the city of Montgomery, known as the Ware place," describing it by location and boundaries. On 24th January, 1872, the said respondent, Mrs. A. A. Ware, executed a mortgage on said house and lot to Shemei Gresham, to secure a designated indebtedness, said mortgage containing a power of sale, on the maturity of the debt, twelve months after the date of its execution, in the event of default in payment. On 17th October, 1881, default having been made, the property was sold under the power of sale, at which sale said Gresham bought, and immediately went into actual possession and continued in possession, claiming title to the premises under his purchase at the mortgage sale, at the time of the institution of Mrs. Ware's suit for redemption.

On the 21st February, 1882, Mrs. Ware filed her bill to set aside the sale and to be permitted to redeem, and offering to pay any balance which might be ascertained to be due Gresham; alleging payment and the reception of rents by said Gresham, and submitting herself to the jurisdiction of the court for any decree foreclosing the mortgage. On 1st October, 1884, the Chancery Court rendered a decree in substantial accordance with the prayer of the bill, setting aside the sale by Gresham under the power in his mortgage and allowing Mrs. Ware to redeem. From this decree said Gresham appealed to this court, giving a *supersedeas* bond. The decree of the chancellor was affirmed in January, 1886; and "the case is still pending in the Chancery Court undetermined finally."

On the 15th December, 1870, the respondent, Marshall H. Molton, recovered a judgment in the Circuit Court against Robert Y. Ware for \$3,090.00. Ware appealed to the Supreme Court, giving a *supersedeas* bond, with Mrs. A. A. Ware as one of the sureties. On the 11th January, 1873, the judgment of the Circuit Court was affirmed, with damages. In May, 1884, no execution having issued on the judgment as

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affirmed, *sci. fa.* was issued to revive it; and in July, 1884, the judgment was revived against Mrs. Ware alone, the said Robert Y. Ware having been discharged in bankruptcy. On the 8th August, 1884, execution on this revived judgment was issued "and levied on the city lot in Montgomery, and not on any equity of redemption Mrs. Ware had in the same;" and on the 1st Monday in October, 1884, it was sold by the sheriff and bought by the respondent, Marshall H. Molton, for the sum of \$6,900.00; which satisfied said judgment and the execution was so returned by the sheriff. The sheriff executed a deed to said Molton conveying to him "all the legal right, title, interest and claim which the said Asenath A. Ware had and held in and to the foregoing described premises," and this deed was duly placed upon record. The bill avers that, "at the time of said levy and sale, under said execution, said Gresham was in the actual possession, occupancy and control of said property under his purchase, as aforesaid, at said mortgage sale, and that at said time said suit in the Chancery Court of Montgomery county, between the said Asenath A. Ware and the said Gresham was pending and wholly undetermined and that the same is now pending for the purpose of adjusting the accounts between the parties." It was further alleged in the bill that, "at the time of said levy and sale of said property under said execution" the said Asenath A. Ware "had no interest in the said property subject to levy and sale under execution, her only interest then being her statutory right of redemption; and orator further charges, and here avers, that nothing whatever passed by said sale, and that the same was absolutely null and void for the further reason that at the time of said levy and sale under said execution the said property was in the actual possession, custody and control of said Gresham, under and by virtue of his purchase aforesaid at said mortgage sale." The bill prayed that the sheriff's deed to Molton be cancelled and annulled; that the priority of complainant's execution over that in favor of said Molton be established; and, in the event of a sale of the property to pay any part of the mortgage debt in favor of Gresham, and the payment into court of the proceeds of said sale, after satisfying said mortgage debt, that the priority of complainant's right therein be likewise established and declared.

The complainant subsequently, on April 22d, 1886, amended his bill by adding as parties defendant Geo. F. Moore, Mary W. Molton, Thomas J. Molton, and the said Shemei Gresham. This amended bill (which the view of the case taken by the court renders it unnecessary to notice with particularity) averred, among other things, that on the 23d October, 1884, the said Mrs. A. A. Ware, Marshall H. Molton, Mrs. Mary W.

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Molton, and her husband, Thomas J. Molton, made an agreement, by which it was stipulated that, in the proceeds which might be left, after the payment of the balance due to said Gresham, whenever it was finally ascertained by the Chancery Court, said Marshall H. Molton should have 52½ per cent., and that said Mary Molton should have 47½ per cent. In said agreement the judgment of said Molton against Mrs. Ware is recited; the revivor thereof, and the issue of execution thereon; the levy and sale of the house and lot and its purchase by Marshall H. Molton; that Mrs. Ware had appealed to the Supreme Court to set aside said revived judgment; and reciting further that Mrs. Ware, on the 24th June, 1884, had conveyed the said house and lot to Mrs. Mary W. Molton; and that the agreement was designed as a settlement of the various matters without further litigation. It was also further agreed that the suit against Gresham should proceed to final determination, and the proceeds remaining, after the satisfaction of Gresham's debt, were to be distributed as above stated. The said deed to Mary W. Molton, and the above agreement, are prayed to be declared fraudulent and void as to complainant; and that the lien of complainant's execution be declared to be prior and superior thereto.

Upon final hearing, upon pleadings and testimony, the chancellor was of opinion that the complainant was not entitled to the relief prayed, and caused a decree to be entered dismissing his bill. This decree is here assigned as error.

JOHN GINDRAT WINTER, and WATTS & SON, for appellant.

TROY, TOMPKINS & LONDON, and GEO. F. MOORE, *contra*.

CLOPTON, J.—Although by our rulings, the estate vests, at law, in the mortgagee freed from the condition annexed to the mortgage, after the law-day and default in performance, an equity of redemption still remains in the mortgagor. While a foreclosure under a power of sale contained in a mortgage as effectually cuts off the equity of redemption, as would a decree in a court of equity, leaving nothing in the mortgagor but a statutory right of redemption, when the mortgagee purchases at his own sale, he arms the mortgagor with an option, if seasonably expressed, to disaffirm the sale, without reference to its fairness, or the adequacy of the price.—*Garland v. Watson*, 74 Ala. 323. Mrs. Ware expressed her election to disaffirm the sale made in October, 1881, by the mortgagee, at which he himself became the purchaser, by filing her bill, within a few months thereafter, to have it set aside, and to be permitted to redeem. Until the avoidance of the sale, the equity

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of redemption may be regarded as in abeyance; but the decree of the chancellor, rendered in August, 1883, declaring it void, and letting her in to redeem, related back to the time of the sale, and operated to place the equity of redemption in *statu quo*—to preserve a continuous entirety, unbroken and uninterrupted. On being declared void and vacated, the sale was without effect on the prior and existing equity or interests of the mortgagor.

The decree was in full force and effect, not having been superseded, in October, 1884, when the mortgaged property was sold under the execution in favor of Marshall Molton, and bought by him, and has so continued ever since. But it is contended, that as the law-day of the mortgage had passed, and the mortgagee was in possession at the time of the levy and sale, the equity of redemption was not subject to levy and sale under execution at law,—that under the statute, there can be no valid levy and sale after the law-day unless the mortgagor remains in the actual possession. The statute provides: "executions may be levied on an equity of redemption in either land or personal property. When any interest less than the absolute title is sold the purchaser is subrogated to all the rights of the defendant, and subject to all his disabilities." Prior to and independent of the statute, the mortgagor's possessory interest in personal property, when a certain ascertained possession for a definite period, could be sold under execution, and when sold, carried with it, the equity of redemption. Also when the mortgage conveyed lands, but the right of possession until default or some future definite period was reserved to the mortgagor, he had a valuable legal estate, which was subject to levy and sale under execution, and the purchaser acquired such legal title as will support ejectment.—*Hawkins v. May*, 12 Ala. 673; *Harbinson v. Harrell*, 19 Ala. 753; *Bernstein v. Humes*, 71 Ala. 260. The statute is not merely declaratory of these pre-existing rules. Its evident purpose is to subject to levy and sale a title or claim which would not otherwise be subject. We must therefore, give a field of operation other than when the mortgagor is in possession by right of possession. Prior to the statute, when the possession of the mortgagor was merely *permissive*, either before or after the law-day, he had no such interest as was subject to levy and sale under execution. Only in a court of equity, could judgment creditors redeem, or compel a foreclosure of the mortgage, in order to subject to the payment of their judgments whatever surplus may remain after its satisfaction. The previous statute expressly declared, that the equitable title or claim to land should be liable to the payment of debts by suits in chancery, and not otherwise. To avoid the delay and expense of a suit in equity, the statute in-

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terposes, and subjects the equity of redemption to levy and sale under execution, and subrogates the purchaser to all the rights of the mortgagor.—*Thompson v. Thornton*, 21 Ala. 808; *Lovelace v. Webb*, 62 Ala. 271. In *McConeghy v. McCaw*, 31 Ala. 447, it was held, that the interest of the maker of an absolute bill of sale to a slave, but intended as security for a debt, is an equity of redemption, coming within the letter of the statute, and can be sold under execution against him. The holder of the bill of sale was in possession, entitled to the slave's services for the use of his money. But it is said, that the sheriff's sale was before the law-day. Such fact does not appear in the report of the case, and is not stated, nor is any stress placed on it in the opinion; and if the fact is conceded, the principle of the decision is, that the equity of redemption may be levied on and sold, notwithstanding the mortgagor is not in possession. The statute uses the general term, the *equity of redemption*, unqualified by possession or otherwise—the right of the mortgagor before the law-day, to defeat the passing of the absolute estate to the mortgagee by performance of the condition of defeasance, and the right created by equity after the law-day, to call for a reconveyance by payment of the principal, interest, and costs, if any, without reference to the possession, whether in the mortgagee or mortgagor. Each comes within the letter of the statute, and there can be no sufficient reason, why either should be regarded as without its spirit. Any other construction would render the statute nugatory by leaving no field of operation. We, therefore, hold that Mrs. Ware had an equity of redemption, which could be sold under execution against her, at the time the property was levied on and sold.

The levy having been made on the land, without being limited to the interest of the mortgagor, it is further contended, that if the equity of redemption is subject to levy and sale, it should have been levied on *eo nomine*, and that a levy on the land does not operate to pass to the purchaser the equity of redemption. Such is the ruling in Connecticut, but founded, as it seems, on the construction of statutory provisions. In Maine and Massachusetts it has been held, that the creditor may extend his execution upon the whole estate, and such levy will pass the interest of the debtor, whatever it may be.—*Littlefield v. Cudworth*, 15 Pick. 23; *Brown v. Clifford*, 38 Me. 210; Freeman on Ex'ts. § 382. In *Lovelace v. Webb*, *supra*, cited and relied on by counsel, the levy was on the *land*. After referring to the purpose of the statute to benefit the mortgagor and his judgment creditors, it is said: "When the sale is made, however, it is of the equity of redemption, of no other or greater interest, and the statute in words expresses the legal consequence—the purchaser *is subrogated to all the rights and*

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subject to the disabilities of the mortgagor." No question arose as to the character of the levy, but the right of the purchaser to redeem from the mortgagee is maintained, which could only have been done on the principle that by the levy, sale and purchase, he acquired the equity of redemption. Under our statutes the execution creditor has the election to restrict the levy to the equity of redemption, or to levy on the land. If restricted, the purchaser acquires no greater interest, than specially defined in the levy. He is estopped to dispute the validity of the incumbrance; and if in fact there is no mortgage, though supposed and believed, there is no equity of redemption, and no interest passes by the levy and sale; he can not take the entire estate unincumbered. But if he desires to contest the validity of the incumbrance, because it has been removed by payment and satisfaction, or otherwise, or because fraudulent, or on any other sufficient ground, he may cause his execution to be levied on the land, and a sale thereunder, will pass whatever interest the defendant may have—the equity of redemption, if there be a valid existing mortgage, the purchaser being subrogated to the rights of the mortgagor. The purchaser acquires all the estate of the defendant in execution, legal or equitable, subject to levy and sale; the greater includes the less. The statutes were not intended to put the creditor to his election. Whether the sheriff's deed, purporting to convey "all the legal right, title, and interest and claim" of Mrs. Ware, operates to convey the equity of redemption, is immaterial. Molton, the purchaser, acquired an equity, which being prior in point of time, is superior to the equity of complainant.

It is not shown, that there was any connection between the purchase of the equity of redemption, and the subsequent arrangement with Mrs. Molton. They are independent of each other. No fraud is alleged or proved. Marshall Molton, having obtained the equity of redemption by a valid purchase, could make such disposition of it as he might deem proper, free from question by the creditors of Mrs. Ware, whose rights were not offended. He could have given it to Mrs. Molton if he chose, or used a part of the proceeds to compromise a claim to the property set up on her part, whether or not well founded, and to induce Mrs. Ware to prosecute her bill to settle the accounts between the mortgagee and herself as mortgagor seeking to redeem.—*Micou v. National Bank*, 104 U. S. 530.

Affirmed.

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Action of Assumpsit Against Commission Merchants.

1. *Testimony of party as to transaction with, or statement by deceased person.*—To disqualify a party from testifying as a witness, “as to any transaction with, or statement by any deceased person, whose estate is interested in the result of the suit, or when such deceased person, at the time of such statement or transaction, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is offered” (Code, § 3058), “there must be an immediate conflict of interest involved in the issue to be tried—the effect of the evidence must be to diminish or enlarge the rights of the decedent’s estate.”

2. *Objections to evidence.*—When evidence is correctly admitted, as offered, though objected to, the subsequent introduction of other evidence can not render that ruling erroneous, but another objection must be interposed, based on such additional evidence.

3. *Proof of agency.*—The fact of agency may be proved by circumstances, and may be inferred from previous employment in similar acts or transactions, or from acts of such nature and so continuous as to furnish a reasonable basis of inference that they were known to the principal, and that he would not have allowed the agent to so act without authority; but the fact that the agent performed similar acts for other persons in the neighborhood, in and about the same business, does not authorize the inference that he was authorized to perform such acts as agent for plaintiff.

4. *Declarations of agent; admissibility of, as evidence against principal.*—The declarations of an agent, made during the continuance of the agency, and while in the discharge of his duties as agent, respecting a transaction then depending, and so contemporaneous with the main fact as to constitute a part of the *res gestæ*, are binding on the principal, and admissible as evidence against him; but this rule does not apply to declarations which are merely narrative of a past transaction, or which do not appear to relate to the subject of the particular agency.

5. *Extent of agent’s authority.*—Authority to an agent to ship cotton, and forward the bills of lading to the consignees, does not include or imply authority to receive advances on the cotton from the consignees; and while authority to ship and sell may imply authority to receive the proceeds of sale, it does not confer authority to appropriate the proceeds of sale to the payment of the agent’s individual debt.

6. *What constitutes payment of mortgage debt.*—Where a creditor, taking a mortgage from his debtor, assumes the payment of a prior mortgage on the property, but suffers it to be sold under that mortgage, becomes himself the purchaser at a sum sufficient to pay the debt, and pays the purchase money; this is a substantial performance of his promise, the first mortgage being satisfied in full.

APPEAL from Jackson Circuit Court.

Tried before the Hon. JAMES E. COBB.

Pleasant H. Helton sued out an attachment against Hill, Fontaine & Co., commission merchants, residing in Memphis,

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Tenn., and executed the same by the service of writs of garnishment on certain creditors of the defendants residing in Jackson county, Ala. The plaintiff claimed of the defendants the proceeds of fourteen bales of cotton, sold by them on his account and which they failed to pay to him. The defendants appeared by counsel and defended the suit. The facts, as they appear in the record, are, that Helton brought fourteen bales of cotton to Stevenson, a station on the Memphis and Charleston railroad, in the winter of 1881-2, and delivered them to one Martin, the depot agent, with instructions to ship them in the name and for account of plaintiff, to Hill, Fontaine & Co., Memphis; that the cotton was so shipped, and its receipt acknowledged, as shown by the following letter, addressed to the agent of Helton, at Stevenson:

"Mr. R. A. Caffey, Stevenson, Ala., Memphis, Tenn., June 9th, 1882.

"Dear sir: We have received yours of the 8th inst., and have to say that we have in our hands (14) fourteen bales of cotton, shipped to us by J. H. Martin, in the name of P. H. Helton. None of same has as yet been sold.

"Respectfully. Hill, Fontaine & Co."

The plaintiff testified on the trial of the cause, that at the time he delivered the cotton to Martin, he, plaintiff, requested Martin to ship the cotton to Hill, Fontaine & Co., and to write them that he, Helton, would instruct them when to sell, and not to sell till he, Helton, instructed them. Defendants objected to this part of plaintiff's testimony as violative of § 3058 of the Code of 1876, the said Martin being dead, and moved to exclude it. The court allowed the witness to testify, and refused to exclude. In response to the demand of plaintiff for the proceeds of this cotton, Hill, Fontaine & Co. claimed that they had paid the said Martin for it, with whom they had an account for money advanced by them to Martin on shipments of cotton made by him, and sought to show that Martin was the agent of the plaintiff to control the sale and proceeds of the cotton in controversy, by introducing evidence that other parties at Stevenson were accustomed to entrust the sale and management of the proceeds of their cotton to Martin, and that defendants had been accustomed to settle with Martin. To this mode of establishing the agency of Martin to dispose of plaintiff's cotton, plaintiff objected, and the court sustained the objection. The defendants further sought to show that the plaintiff had been paid for the cotton in question, by Martin; and for this purpose offered a mortgage executed by Martin and his wife to R. A. Caffey, John P. Timberlake and the plaintiff, to secure an indebtedness of two thousand dollars to each of said parties, said mortgage bearing

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date May 30th, 1882, claiming that the two thousand dollars stated to be owing to the plaintiff, embraced the amount of the proceeds of the cotton Martin had shipped for him. This was denied by Helton, who introduced evidence to show the consideration of the mortgage debt. The defendants offered in evidence a number of letters, written by Martin, in reference to this cotton, for the purpose of showing his agency of the plaintiff, but upon objection of plaintiff they were excluded from the jury, whereupon the defendants excepted. The defendants asked the following written charges: 1. "If the jury find from the evidence that J. F. Martin was engaged in the business of shipping cotton, not as depot agent, and that Helton placed the fourteen bales of cotton in his possession and also placed in his possession or left with him the bills of lading for said cotton and that said cotton was shipped to Hill, Fontaine & Co., by J. F. Martin as Helton's agent, and that the bills of lading were also sent by said Martin to Hill, Fontaine & Co., and that said defendants, in good faith, and in ignorance of the fact (if it be a fact) that Martin was not duly authorized to sell the cotton, advanced to Martin the full value of the cotton, then their verdict must be for the defendants." 2. "If the jury find that J. F. Martin was the agent of P. H. Helton for the purpose of shipping and selling the fourteen bales of cotton, and that Hill, Fontaine & Co., paid Martin in full for said cotton, then their verdict must be for the defendants." 3. "If Helton agreed, as part consideration of the mortgage that he, Helton, would pay his part of the Hurt mortgage, being a claim of seven hundred dollars, and that said Helton never paid said mortgage but suffered said mortgage to be foreclosed, and bought the mortgaged land at the sale, this would not be a payment of the mortgage, and not a payment of the seven hundred dollars." The court refused to give each of these charges, and the defendants excepted. There was a verdict for the plaintiff, and the defendants take this appeal, assigning as error the various adverse rulings of the court upon questions of evidence excepted to, and the refusal to give the foregoing charges.

D. D. SHELBY, and R. W. WALKER, for appellants—1. The court erred in excluding the letters written by Martin while acting as agent for Helton, relating to this cotton, and tending to establish, by his admissions, that he had authority from Helton to control the sale of the cotton. Such admissions of the agent are binding on his principal—2 Wharton on Evidence, § 1173, note; 1 Gr. Ev. §§ 113–114; *Danner v. Ins. Company*, 77 Ala. 188; *Ala. G. S. Rd. Co. v. Hawk*, 72 Ala. 117. 2. The question whether Martin was or was not Helton's agent, to receive

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pay for the cotton, was a fact for the determination of the jury, when sought to be established by parol proof.—*Womack v. Reed*, 63 Ala. 500. The plaintiff's theory was that he dealt with Martin only as depot agent. The defendants claimed, and sought to show, that he dealt with him as an agent engaged in the shipment of cotton, and with that purpose offered evidence that Martin was engaged in the shipment of cotton to commission merchants and acting as shipper and collector. This they were not permitted by the court to do.—*Stephens' Dig. Ev. p. 20 Art. 13.* 3. Fontaine testified that Martin was engaged in the business of shipping cotton and getting advances thereon, and controlling the shipments which were often in the names of third parties. This being in evidence it was competent to show by another witness a general knowledge of such dealing, in the neighborhood, as tending to trace notice thereof to Helton.—*Hodges Bros. v. Coleman*, 76 Ala. 114; 2 Brick. Dig. p. 847.

J. E. BROWN, and R. C. BRICKELL, *contra*.—The statute (Code, 1876, § 3058) excludes a party from testifying to statements by, or transactions with, a person deceased, only in two contingencies; first, when the estate of such deceased person is interested in the result of the suit; second, when, at the time of such statement or transaction such deceased person was acting in a representative or fiduciary relation to the party against whom such testimony is sought to be introduced. Neither of these contingencies exist in the present case. 2. Before the acts, declarations or admissions of one professing to be the agent or acting for another, can be received as evidence to affect the supposed principal, the authority or agency of the former must be shown *aliunde*; it is not to be inferred from the acts, declarations or admissions.—*Whart. Agen. § 153*; 1 Brick. Dig. 54–9; *Wright v. Evans*, 53 Ala. 103; *Galbreath v. Cole*, 61 Ala. 139. That Martin blended with his relation of depot agent the business of shipping cotton as agent of planters shipping from the depot, and that the fact was notorious in the neighborhood, and known to Helton, had no tendency to prove that the plaintiff had entrusted him with the shipment of this cotton, or authorized him to receive the proceeds of its sale, or to apply the proceeds in the payment of his debt.—*Fisher v. Campbell*, 9 Port. 210; *Blevens v. Pope*, 7 Ala. 371; *Grant v. Cole*, 8 Ala. 519. 3. One who deals with an agent is bound, at his peril, to ascertain the extent of his authority.—1 Brick. Dig. p. 55, § 35; *Cummins v. Beaumont*, 68 Ala. 204. 4. The authority to Martin to ship the cotton in the name of Helton, and for that purpose being entrusted with the bill of lading, showing the ownership of Helton, would not authorize the de-

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endants to advance Martin money and hold Helton's cotton for such advance.—*Lane v. Davis*, 25 Ala. 335; *Bott v. McCoy*, 20 Ala. 578; *Voss v. Robertson*, 46 Ala. 483; *Moore v. Robinson*, 62 Ala. 537. 5. The mere possession of a bill of lading, not in any manner transferred or endorsed, is not evidence of the ownership of goods.—*Lickbarrow v. Mason*, 1 Smith L. C. 1141 (Am. Note 1190); *Voss v. Robertson*, 46 Ala. 483.

CLOPTON, J.—The appellee brings this suit to recover the proceeds of cotton, which was sold by the appellants as commission merchants. There seems to be no controversy as to the ownership or sale of the cotton. The disputed question is, in what capacity did Johnson Martin, to whom defendants accounted for the proceeds, act—whether he shipped the cotton, merely as depot agent, or whether as agent of the plaintiff under an arrangement between the defendant and Martin, by which they advanced him money to control the shipments of cotton?

The plaintiff was allowed, against the objection of defendants, to prove by his own testimony, the instructions in regard to the sale of the cotton, which he requested Martin to write the defendants, and his agreement to ship it accordingly. Martin was dead at the time of the trial. The statute abrogates, in civil suits and proceedings, the common law rule, which excludes a witness, because he is a party, or interested in the issue tried, with a limitation, "that neither party shall be allowed to testify against the other, as to any transaction with, or statement by, any deceased person whose estate is interested in the result of such suit, or when such deceased person, at the time of such statement or transaction, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced."—Code, 1876, § 3058. The purpose of the limitation is, to exclude a party to the transaction or statement from rendering it in his own interest after the death of the other party. It is not an interest in the judgment as evidence, which disqualifies a party as a witness; but a direct and immediate conflict of interest involved in the issue to be tried. The effect of the evidence must be to diminish or enlarge the rights of the decedent's estate. The presumption being in favor of competency, it is incumbent on the party affirming the incompetency of the witness to show, that the testimony, sought to be introduced, falls within the statutory exclusion.—*Ala. Gold Life Ins. Co. v. Sledge*, 62 Ala. 566; *Hendricks v. Kelly*, 64 Ala. 388; *Dismukes v. Tolson*, 67 Ala. 386.

At the time the objection to the testimony was made and
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ruled on, it did not appear, nor was it proposed to show, that Martin's estate had any interest in the result of the suit, or that he had sustained any representative or fiduciary relation to the defendants. We can not consider the evidence subsequently introduced, for the purpose of putting the court in error as to a previous ruling, which was not erroneous when made, as the case then appeared. If it be conceded, that the incompetency of the plaintiff, to testify to a transaction with, or statement by Martin, was disclosed by the evidence subsequently introduced, the objection should have been made in the Circuit Court by a motion to exclude, based on such evidence. It was not the duty of the court, *ex mero motu*, to exclude the testimony.

Agency, like any other controvertible fact, may be proved by circumstances. It may be inferred from previous employment in similar acts or transactions; or from acts of such nature, and so continuous, as to furnish a reasonable basis of inference, that they were known to the principal, and that he would not have allowed the agent so to act unless authorized. In such cases, the acts or transactions are admissible to prove agency. But in order to be relevant, the alleged principal must, in some way, directly or indirectly, be connected with the circumstances. The agent must have assumed to represent the principal, and to have preformed the acts in his name and on his behalf. The testimony of the witness, Allison, tended to prove nothing more, than that Martin was engaged in the business of shipping the cotton of planters in the neighborhood of Stevenson other than the plaintiff, and receiving and controlling the proceeds, and that this was generally known. It is not pretended, that he had previously shipped or controlled any cotton, as agent of the plaintiff. From the facts, that Martin was engaged in the business of shipping cotton, separate from his duties of depot agent, and had controlled the cotton of other planters, it does not follow, and can not be reasonably inferred, that the plaintiff authorized him to ship and control the cotton in question as his agent. Acts done by Martin as the agent of *other* planters are not admissible and relevant to prove agency in the particular shipment of the plaintiff's cotton, in the absence of other evidence of authority, express or implied from circumstances, furnishing a ground of reasonable inference of assent, adoption, or acquiescence.—*Fisher v. Campbell*, 9 Por. 220.

The declarations and admissions of an agent are admissible against, and bind his principal, when made during the continuance of the agency, and while in the discharge of his duties as such, respecting a transaction then depending, and so contemporaneous with the main fact, or subject of the agency,

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as to constitute a part of the *res gestæ*. "The rule admitting the declarations of an agent is founded upon the legal identity of the agent and the principal; and therefore they bind only so far as there is authority to make them." Declarations, mere narrations of past occurrences, are not admissible.—*Danner L. & N. Co. v. Stonewall Ins. Co.*, 77 Ala. 184; Whar. Ev. § 1173; 1 Greenl. Ev. §§ 113, 114. Preliminary proof of authority to make the declarations is requisite to their admissibility and binding effect. The letters and written statements of Martin, offered by the defendants, are but his declarations. The evident purpose of their introduction was to show either the agency and the extent of authority, or a purchase of the cotton and payment thereof. They are not admissible for either purpose. Agency and the extent of authority must be established by evidence, other than the acts and statements of the supposed agent. None of the letters or statements *prima facie* represent any transaction performed by Martin as agent of the plaintiff, and while in the discharge of his duties as such agent. With two exceptions, none of them allude to the cotton in controversy; and those, which make any reference to it are narratives of past occurrences, and declarations of a purchase and payment. They do not come within the rule of admissibility.

By the first charge, the defendants requested the court to instruct the jury substantially, that they are exempted from liability to the plaintiff, if he placed the cotton and the bills of lading in the possession of Martin, and Martin shipped the cotton to the defendants, and sent them the bills of lading, and thereupon they in good faith and in ignorance of Martin's want of authority to sell the cotton, advanced to him its value, though the extent of his authority was to ship, and send the bills of lading, to the defendants. We presume, the proposition of the charge is founded on the principle, that on the facts stated, the defendants are *bona fide* purchasers without notice. Without considering the negotiable character of a bill of lading, or to what extent the doctrine of *bona fide* purchasers applies to such instrument, it suffices, that the bills of lading show on their face, that the cotton was received from the plaintiff by Martin as agent, presumptively for transportation, and was consigned to the defendants. Mere possession of them, and their transmission by Martin to the defendants, under the circumstances, did not authorize them to infer, that he had any right to the cotton, or any authority to receive advances on it. The bills of lading were forwarded to the defendants, who were the proper holders, and constituted their authority to receive the cotton. Inquiry into the true character of the transaction is not precluded, because they may have

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ignorantly and in good faith advanced money to Martin.—*Pollard v. Vinton*, 105 U. S. 7. The instruction, however, does not rest the exemption from liability on apparent ownership arising from possession, but on the ground of an agency to ship, and forward the bills of lading. In this respect, the charge ignores the settled rule, that mere ignorance of want of authority is not sufficient to protect a party dealing with an agent, though he may have innocently paid value. He is bound at his peril to ascertain the extent of authority. Agency to ship the cotton, and forward the bills of lading to the consignees, does not purport to carry authority to receive advances on the cotton. Such agency and the authority of the agent terminate, when the cotton is shipped and the bills of lading are forwarded.

The only mode, in which it is claimed that defendants paid Martin for the cotton is, by crediting the proceeds of sale in his account for money advanced on this and other cotton to enable him to control shipments. While an agency to ship and sell may imply authority to receive the proceeds of sale, it will not extend to authority to appropriate such proceeds to the payment of an individual indebtedness of the agent. The jury might have inferred from the second charge requested by the defendants, when referred to the evidence, that a payment in such manner would bind the plaintiff. The charge is calculated to mislead.

The third charge is abstract, and asserts an incorrect proposition of law. Though the plaintiff may have agreed, as part consideration of the mortgage executed in May, 1882, by Martin, to pay a mortgage to Hurst, which was a prior incumbrance on the property, a branch of such agreement would not constitute a valid defence to the present suit. If the plaintiff, instead of a voluntary payment of the mortgage debt to Hurst, suffered a foreclosure for some real or supposed necessity to protect and quiet his title, and purchased the property at the foreclosure sale for an amount sufficient to pay the debt, and paid the purchase money, the debt is discharged and the mortgage satisfied—there is a substantial performance of the agreement. The mortgagor's equity of redemption under the second mortgage would not be defeated or impaired.

Affirmed.

McDevitt v. Lambert.

Statutory Action for Unlawful Detainer.

1. *Stipulation in lease for continuance of possession after expiration of term.*—When a written lease contains a stipulation, that the lessee may, after the expiration of the term, “continue to occupy by the month,” but does not bind him to do so, each party has an equal right, after the expiration of the term, to put an end to the tenancy by the month, by giving reasonable notice.

2. *What is reasonable notice.*—In the absence of statutory regulations, if a lease contains no provision as to the notice necessary to put an end to the tenancy, reasonable and sufficient notice is “the interval between the times of payment of rent, or the length of time by which the letting was first measured;” and when the tenancy is by the month, a month’s notice must be given.

3. *Specific objection to evidence.*—An objection to the admission of evidence, on a single specified ground, is a waiver of all other grounds of objection.

4. *Statutory notice, or demand in writing.*—The statutory notice, or demand in writing, which is necessary to the maintenance of an action of unlawful detainer (Code, § 3697), is distinct from the notice which, in case of a tenancy by the month, is necessary to put an end to the tenancy, and terminate the defendant’s rightful possession; and this statutory notice can not be given while the defendant is in rightful possession.

APPEAL from the Circuit Court of Madison.

Tried before the Hon. H. C. SPEAKE.

This was a statutory action for the unlawful detainer of certain realty in the city of Huntsville, commenced in a justice’s court on the 1st April, 1882, by Jno. F. McDevitt and wife against John and Benjamin Lambert, and removed by appeal, at the instance of the defendants, into the Circuit Court. The premises in controversy, consisting of a warehouse and other property, were, by a written instrument which was introduced in evidence and is copied into the bill of exceptions, leased by the appellants to said J. and B. Lambert for the term of “two years from the first day of March, 1880.” This instrument contained a stipulation which provided that, in certain contingencies, the said J. and B. Lambert “might continue,” after the expiration of the term of two years, “to occupy by the month.”

As shown by the bill of exceptions, the appellant, the said McDevitt, as a witness in his own behalf, testified that “some-time in the month of March, 1882, the exact day of which witness did not remember, he notified defendants verbally that he wanted them to quit the premises and turn them over to wit-

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ness, that witness would not let them occupy the same any longer; and that one of the defendants, or both, told witness, that they claimed the right under the lease to occupy the premises and that they would not get out, but would hold possession of the premises as long as they pleased—and that the defendants did occupy the said premises thereafter for about two years.” The witness further testified that about ten days before the 1st day of April, 1882, he served a written notice on the defendants demanding that the premises be vacated and surrendered to him on said 1st day of April, 1882; but that defendants refused to comply with the demand for possession and continued in the occupancy of said premises. Thereupon, as further shown by the bill of exceptions, the defendants moved the court “to exclude all the testimony offered by plaintiff showing, or tending to show, notice or demand in writing made by the plaintiffs on defendants to quit and surrender the possession of the premises sued for, because the proof showed that the notice was given before the lease had expired, and while the defendant had the lawful right to retain possession of the premises sued for.” The court granted the motion and excluded said testimony, and the plaintiffs thereupon took a non-suit with a bill of exceptions.

The ruling of the court above noted is here assigned as error.

L. W. DAY, for appellants.—(1). Notice to quit at the common law was as a rule required to be given while the lessee was in and entitled to possession, as its office was to terminate a tenancy at will. If there was no tenancy at will, no notice was given or required.—*Caffin v. Lant*, 2 Pick. 70; *Elliott v. Stone*, 1 Gray 571; *Prindle v. Anderson*, 19 Wend. 391; *Wade on Notice*, § 611; *Walker v. Sharpe*, 14 Allen 43. (2). The tenancy in question, from month to month, even if so entered upon, was no more than a tenancy at will.—1 Washb. Real Prop. 370, 371, 375, n. 23–26; *Collins v. Johnson*, 57 Ala. 304. (3). Appellants had the right to terminate the lease and did so as shown by the proof, even if the monthly tenancy had lawfully begun to run.—1 Washb. Real Prop. m. p. 372, §§ 8, 9, 10, pp. 398, 399, 400 and n.; *Cook v. Cook*, 28 Ala. 660; *Ellis v. Paige*, 1 Pick. 43; *Rising v. Stannard*, 17 Mass. 282; 1 Greenleaf Cruise Dig. m. p. 244, §§ 12, 13; *Lomax v. Spear*, 51 Ala. 532. (4). Appellants had the right to limit their consent to the tenancy of the premises by the appellees in the month of March to the mere matter of removing “machinery and traps.” This would be no recognition of a tenancy for that month.—*Wade on Notice*, § 601; *Doyle v. Gibbs*, 6 Lans. (N. Y.) 180; 1 Wash. Real Prop. m. p. 385, § 11. (5). Appellants declined to recognize any tenancy by re-

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fusing to receive rents.—*Prindle v. Anderson*, 19 Wend. 391; *Logan v. Ilinson*, 8 Serg. & Rawle. 459. (6). The court erred in holding that this suit was prematurely brought. Every requisite of notice had been met.—*Spear & Thomason v. Lomax*, 42 Ala. 576; *Logan v. Herron*, 8 Serg. & Rawle. at p. 465.

D. D. SHELBY, *contra*.—(1). A demand made before the expiration of the tenant's possessory interest, would be merely a notice that a demand would be made after its termination. If the statute, Code of 1876, § 3697, be construed differently, it could in practice be abrogated by putting in every lease a written demand, and acknowledgment of notice of such demand; because if such demand can be made ten days before the termination of the possessory interest, it can be made at the beginning of the lease. (2). As defendants were holding over by the month, they were entitled to a month's notice to terminate the tenancy.—*Prindle v. Anderson*, 19 Barbour (N. Y.) 391. And after the termination of the possessory interest, the statutory notice should have been given before suit brought.

STONE, C. J.—McDevitt and wife let the premises in controversy to Lamberts, by a definite contract of lease for two years, to expire the last day of February, 1882. The agreed rental was payable monthly. The lease contained this further clause: "It is also agreed, that in case the party of the first part does not dispose of the property, at the time of expiration of lease, the party of the second part may continue to occupy by the month, by complying with the above agreement." There being, under this agreement, no binding obligation resting on Lamberts to continue the tenancy any longer than they chose, after March 1, 1882—a mere privilege—the lessors were armed with an equal right to terminate it, whenever they elected to do so. One contracting party not being bound for any definite term, the law secures to the other the same privilege of putting an end to the tenancy, with or without a reason. And from and after the end of the two years—February 28, 1882—the relation of the parties became that of a tenancy by the month, which either the landlord or tenant could put an end to by giving reasonable notice.—1 Coke Inst. 55 a; *Cheever v. Pearson*, 16 Pick. 266; *Doe v. Richards*, 4 Ind. 374; 1 Washb. Real Prop. *371; 1 Greenl. Crusie *243; *Jackson v. Deyo*, 1 Johns. 417; *Phillips v. Covert*, 7 Johns. 1; 4 Kent Com. *112; *Collins v. Johnson*, 57 Ala. 304; Taylor Landlord & Tenant, 7th ed. § 466; *Anderson v. Prindle*, 23 Wend. 616; *Cook v. Cook*, 28 Ala. 660.

The plaintiff offered to prove that, about the twentieth of
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March, 1882, he served a written notice on defendants to quit the possession of the premises on the last day of that month. The purpose of this notice was to terminate the tenancy with that month. This testimony was objected to by the defendants, on the express ground that "the proof showed that the notice was given before the lease had expired, and while the defendants had the lawful right to retain possession of the premises sued for." The ground of objection being specified, this was a waiver of all objections, if any existed.—1 Brick. Dig. 887 § 1194; *Alexander v. Wheeler*, 78 Ala. 167.

After February 28, 1882,—the termination of the two years for which the lease makes absolute provision—the tenants were not, by mere force of the contract under which they entered, tort-feasors, or tenants holding over. They were, by the very letter of their contract, in rightful possession as tenants from month to month. This tenancy, as we have seen, either party could put an end to by giving proper notice. What is reasonable or proper notice in such conditions? We have, in this State, no statute bearing on the question, and the contract of lease under which defendants entered is silent on the subject. Speaking of what is reasonable notice in such cases, Washburn, Vol. 1, Real Prop. *380, says: "It is generally true that it will be sufficient if it be equal to the interval between the times of payment of rent, or the length of time by which the letting was first measured, as by the quarter, month, or week." This principle is supported by the following authorities, while we find nothing opposed to it.—Taylor, Landl. & Ten. §§ 466, 7; Wade on Notice § 611; *Doe v. Hazell*, 1 Esp. 94; *Right v. Darby*, 1 T. R. 162; *Doe v. Raffan*, 6 Esp. 4; *Doe v. Scott*, 6 Bing. 362; *Prindle v. Anderson*, 19 Wend. 321; s. c., 23 *Id.* 616; *Greene v. Sinclair*, 52 Mo. 327; *Walker v. Sharpe*, 14 Allen 43; *Pickett v. Ritter*, 16 Ill. 96; *Warner v. Hale*, 65 Ill. 385; *Huyser v. Chase*, 13 Mich. 152; *Woodrow v. Michael*, *Id.* 190; *Logan v. Herron*, 8 Serg. & R. 459; *Caffin v. Lant*, 2 Pick. 70. We feel bound to hold that a month's notice should have been given in this case to terminate the lease.

The present suit is unlawful detainer, commenced April 1, 1882,—the day succeeding the one fixed by the notice as the termination of the lease. The notice, according to the only testimony bearing on the question, had been given about ten days before that time; much less than a month, the time required by the rule. The testimony offered and rejected did not tend to prove a termination of the lease, so as to uphold the present suit. And as that was the only purpose for which it could have been legal evidence, if the Circuit Court erred in rejecting it on the ground stated, it was error without injury. Testimony which does not tend to prove any material fact in-

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volved in the issue, is irrelevant, and should not be admitted. And if admitted, the court commits no error by subsequently ruling it out.—1 Brick. Dig. 109 §§ 79, 85; 3 *Id.* 405 §§ 20, 22.

The present action, it will be remembered, is for unlawful detainer—a statutory action—which must be prosecuted, in the first instance, before a justice of the peace. “An unlawful detainer is where one who has lawfully entered into possession of lands or tenements, after the termination of his possessory interest, refuses, on demand in writing, to deliver the possession thereof to any one lawfully entitled thereto, his agent or attorney.”—Code of 1876, § 3697. The notice here referred to is not the notice to terminate a lease, which we have been considering. The notice to terminate can, in the nature of things, be necessary or proper, only while the tenant is in possession under a lease, express or implied. If he is a mere intruder or trespasser, he is not entitled to notice to quit. Forcible entry and detainer is the proper remedy for evicting such trespasser. When, however, as in this case, the entry is lawful, and the tenancy continues by the terms of the contract until properly terminated by notice to quit, that notice, in the very nature of things, must be given before the lease expires, and while the defendant has the lawful right to retain possession. This, because in a tenancy from month to month, the tenant has the lawful right to retain possession, and his lease does not expire, until it is terminated by a proper notice to quit, as we have stated above. The notice for which section 3697 makes provision is an entirely distinct proceeding, but is, nevertheless, a necessary constituent of our statutory unlawful detainer. The one notice has for its object the termination of an existing lease, which, in the absence of such notice, will sanction and justify the tenant’s continued possession. This can only be necessary when, in its absence, the tenant has the lawful right to retain possession. The other can be given only after the termination of the possessory interest; and in all cases where there has been a previous lawful possessory interest, and the wrong consists in holding over without authority, this notice is one of the necessary constituents of the statutory tort, known as unlawful detainer.—Code, § 3697. Without such notice, the summary jurisdiction of a justice of the peace does not attach. So, in cases like this, it would seem two notices are necessary.

In the motion made in this case to exclude proof of the notice from the jury, and in the stated ground on which its exclusion was moved, it appears to have been dealt with as the notice for which § 3697 of the Code makes provision. That, we have seen, was an error. It was, however, as we have shown

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above, an error without injury; for, in no sense, did the testimony offered tend to prove either of the notices which appear to have been necessary to the maintenance of this action.

Affirmed.

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Bill in Equity to Enforce Testamentary Charge on Lands.

1. *Testamentary charge on lands construed, as to extent charged.*—Where the testator, owning an undivided two-thirds interest in fee in a tract of land, by devise from his deceased wife, and an estate *per autre vie* in the other third, by purchase of the dower interest of his mother-in-law, provided that his mother-in-law should have a comfortable support out of his estate, specially charging it on the lands, and describing them as “the lands devised to me by my deceased wife;” devised the lands, subject to said charge, to his wife’s sister for life, and then charged “the reversion of said lands” after her death with the payment of \$3,000 to his personal representative, for the benefit of his estate; *held*, that while the charge for the support of the mother-in-law might extend to the testator’s entire interest in the land, the charge of \$3,000 was restricted to his undivided two-thirds interest in the fee.

2. *Limitation of suit by assignee in bankruptcy; fraudulent concealment.*—When an assignee in bankruptcy files a bill (or cross-bill) in equity, for the purpose of enforcing a right or claim which had accrued more than two years previously, a general averment of fraudulent concealment is not sufficient to avoid the statutory bar (U. S. Rev. Stat., § 5057): he must aver the facts constituting such fraudulent concealment, and show how or when he first came to a knowledge of the facts which put him on inquiry.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. S. K. McSPADDEN.

This was a bill in equity, exhibited on the 5th September, 1884, by R. E. Spragins, administrator *de bonis non*, with the will annexed of Samuel W. Coons, deceased, against Caleb, Mildred and John Toney, Nina Barclay Humpe, Geo. E. Humpe, Jr., and Alma Barclay. The facts disclosed by the record, as between the original parties to the cause, and the object and purpose of the bill, are stated in the opinion.

Alfred F. Barclay, as the assignee in bankruptcy of Anderson M. Barclay, intervened by petition, praying to be made a party defendant, and on the 28th of May, 1885, filed an answer which he prayed to be taken and treated as a cross-bill, averring that said Anderson M. Barclay was duly adjudged a bankrupt on February 20, 1868, one A. W. Smith being appointed his assignee; that some years before the filing of the

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answer and cross-bill said Smith departed this life, and thereupon, in April, 1885, said A. F. Barclay was appointed assignee in his place and stead; that "upon the death of said Clarissa H. Toney on September 22, 1882, the bankrupt estate of said Anderson M. Barclay, as the owner of an undivided one-third interest in the remainder or reversion of said section nine, became entitled to the possession and enjoyment of said one-third interest;" that during the occupancy and possession by said Samuel W. Coons of the land in question he, said Coons, "during all this time, fraudulently concealed from the assignee in bankruptcy of said Anderson M. Barclay the one-third interest of said bankrupt estate in the reversion or remainder in said lands; that by reason of said fraudulent concealment, said interest was not known to said assignee of said bankrupt estate, or to any one who could act therefor, until less than one year before the filing of this answer." The prayer of the cross-bill was for a decree establishing said Alfred F. Barclay's right, as such assignee, to a one-third interest in said section nine; and upon a partition and division of said section under the direction and decree of the court, that "one full and equal one-third share, or part thereof, may be allotted and conveyed to your orator as such assignee," &c. The complainant demurred to the cross-bill; assigning, among numerous other grounds of demurrer, that "said cross-bill does not aver and set out the facts constituting the alleged fraudulent concealment of the alleged right and title set up in said cross-bill; but only avers that there was a fraudulent concealment of such rights and title; said cross-bill shows that said claim is barred by the statute of limitations of two years (Revised Statutes U. S. 5057) in showing that A. W. Smith was appointed assignee in 1868, and in showing that the life estate of Clarissa Toney terminated Sept. 22, 1882." The chancellor sustained the demurrer, holding that said Barclay, as assignee, was barred by the statute; and caused a decree to be entered in accordance with the prayer of complainant's bill, granting the relief prayed as to all the lands in question.

The overruling of the demurrer, and the final decree of the court in not limiting the enforcement of the charge or lien to two undivided thirds of the land, are here assigned by said Barclay, and his co-respondents, respectively, as error.

R. W. WALKER, for A. F. Barclay, assignee, &c.

CABANISS & WARD, for Caleb Toney, George E. Kumpe, *et al.*, cited the following authorities: 74 Ala. 122; *Id.* 162; 70 Ala. 46; 2 Smith's Lead. Cas. 752; Taylor on Landlord and Tenant, 540, § 629; *Hoffman v. Hoffman*, 26 Ala. 535.

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D. D. SHELBY and R. E. SPRAGINS, *contra*.—(1.) The will, by its terms, makes the charge upon all the land, excepting no undivided part of it. The fact that the will is so framed, connected with the proof of the testator's possession, shows that he claimed not only the life estate of Clarissa H. Toney, but the entire reversion. The testator's possession, the failure of Matilda W. Barclay and her husband, and the assignee of the latter, to assert any claim to this property, is a recognition on their part of the testator's right to it. It is sufficient for the purposes of this case if the appellee shows a title in the testator superior to the adverse titles set up in defense. (2.) The demurrer to the cross-bill was properly sustained.—Blumenstiel's Bankruptcy, p. 238, and authorities there cited; *Evans v. Richardson*, 76 Ala. 329; *Mohr v. Lemle*, 69 Ala. 180; R. S. of U. S., § 5057; *James v. James*, 55 Ala. 526; *Badger v. Badger*, 2 Wallace, 87.

CLOPTON, J.—The first item of the will of Samuel Coons provides, out of his estate, a comfortable support for his mother-in-law, Clarissa H. Toney, during her life, and specially charges land specifically described as being the lands devised to him by his deceased wife, and composed of Section 9, Township 5, Range 2 West, with such support. The second and third items are as follows :

“2. Subject to said charge for the support of my mother-in-law, I devise said lands to Mildred A. Barclay during her natural life.

“3. I charge the reversion of said lands after the death of said Mildred A. Barclay with the payment of three thousand dollars, with interest from my death, payable at the death of said Mildred A. Barclay to my personal representatives for the benefit of my estate, or the legatees or distributees thereof.”

By the fourth item, the lands are devised, subject to the charge for three thousand dollars, after the death of Mildred A. Barclay, to her children then living, the descendants of any deceased child to take the share such child would have taken if living. The bill is brought by appellee as administrator *de bonis non* with the will annexed of Samuel Coons; and its purpose is to enforce the charge on the entire land for the payment of the three thousand dollars with interest. It alleges, and proceeds on the theory, that Coons, the testator, was seized and possessed, and had the right to dispose of, the entire land. It is admitted, that he owned in absolute right an undivided two-thirds interest, but the defendants insist, that as to the other one-third he only had an estate for the life of Clarissa Toney, which has terminated. The controversy extends only to this one-third interest. The chancellor decreed, that the

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entire land was subject, and ordered its sale for the payment of the sum charged with interest from the death of the testator.

Harris Toney, who died in 1843, was at the time of his death seized and possessed of a large tract of land, which included the land involved in this suit, leaving surviving him his wife, Clarissa Toney, and four children, Martha E. Coons, wife of the testator, Mildred A. Kumpe, Matilda Toney, and Charles Toney. By decree of the Probate Court, March 1, 1844, the land in controversy was assigned to Clarissa Toney, as her dower in the real estate. In January, 1860, she conveyed her life estate in the land to Coons, the testator. Charles Toney died intestate, about 1848, never having married, and leaving his three sisters as his only heirs at law. Matilda married Anderson Barclay, and died in 1853, leaving a will, by which she gave all her property, right and interests of every kind to her husband. After the death of Matilda, Mildred married Anderson Barclay, and died in 1884. Martha Coons, who died during the life-time of her mother, acquired by conveyance Mildred's one-third interest in the reversion and devised that and her own one-third to Samuel Coons. Anderson Barclay is also dead, but at what time he died does not appear. He was adjudged a bankrupt in February, 1868, and in April following, A. W. Smith was appointed assignee of his estate. Smith having died, Alfred T. Barclay was appointed assignee in April, 1885. Samuel Coons died in December, 1877, having executed his will on the 26th day of the preceding April; and Clarissa Toney died in September, 1882.

The first question to be considered is, did the testator intend to charge the entire land, or only his reversionary interest with the payment of the three thousand dollars? We have stated the facts particularly and in detail for the reason, that the ascertainment of the intention of the testator requires that the will shall be interpreted in the light of the surrounding facts and circumstances, to which intention, when ascertained, effect must be given. The record does not disclose, that the testator ever acquired the one-third interest in the reversion of Matilda Barclay. At the time he made his will, he owned an estate in the entire land for the life of Clarissa Toney, and an undivided two-thirds share of the reversion.

In a judicial interpretation of the will, and ascertainment of the real intent the court will act on the presumption, that the testator intends only to charge what belongs to him. When the testator owns a partial or future interest in the property devised, the established rule is, that the courts will strongly lean in favor of a construction, which shows an intent to give only the interest, of which he has the power of disposition, and with which he is authorized to deal by virtue of his own

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rights; and will require clear and unambiguous expression, expressly or by clear and manifest implication, of an intent to devise the entire property. To compel an election, it must satisfactorily appear, that the testator attempted to dispose of what he did not own. The language of the will must be such as necessarily describes and includes the entirety of the property, in which he has only an undivided share, or a partial or future interest. If the expressions of the will are ambiguous or doubtful, and the court can not determine that it was manifestly the intention to dispose of property not the testator's own, the *prima facie* presumption will prevail.—In 1 Pom. Eq. Jur. § 473, the learned author says: “Whenever, however, the subject matter, upon which the instrument operates, is something in which the donor himself has a partial interest, and the donee has also a partial interest in it, or the residue of the property in it, and the language of donation is susceptible of a construction which would confine it to this partial interest of the donor, it is plain that a judicial interpretation is needed to ascertain the real intent. Under these circumstances, whenever the testator or other donor has a partial interest in the property dealt with, it is well settled, that the courts will lean most strongly—as far as possible, it has been said—in favor of an interpretation which will confine his disposition to this his own interest, an interpretation which will show an intention on his part to deal only by way of gift with this partial interest which he holds.” If therefore, in view of the facts, and the condition of the title, the will can reasonably be so interpreted as to express an intention to charge only his undivided share of the reversion, such interpretation must be given.—*Havens v. Sackett*, 15 N. Y. 365; *Birmingham v. Kinoan*, 2 Sch. & Lef. 444; 1 Pom. Eq. Jur. §§ 488, 489.

Construing the will by these rules, and reading it in the light of the title held by the testator, and from whom and how derived, it does not appear that he intended or attempted to charge any interest, other than his own. After providing *out of his estate* a support for his mother-in-law by the first item of the will, such support is specially charged upon lands specifically described. The description by section, township, and range, if standing alone, may be sufficiently comprehensive to embrace the entire section, and the entire interest in the land: but it is limited, explained, and qualified by the specific and restrictive description, immediately preceeding.—“*being the lands devised to me by my deceased wife, Martha E. Coons.*” The only land or interest in land devised to him by Martha E. Coons is an undivided two-thirds share of the reversion. The special charge upon the land, for the support of the mother-in-law, connected with the general provision, that such support

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shall be provided out of his estate, may operate to charge the entire estate; and as the testator owned the life estate, the *special* charge may extend to the entirety of an undivided two-thirds interest. But in providing for the security of the payment of three thousand dollars, different language is used, and a charge is made specifically on "*the reversion* of said lands," without other or further description than as given in the first item. What reversion? Where the testator employs words of general description, and has a partial interest, to which the disposing language may reasonably apply, the *prima facie* presumption as to his intent will govern. The principle is, where the disposing words can be applied and confined to the interest which the testator possessed, and the will does not necessarily and clearly purport to give the entirety, the courts will so apply and confine them. The same principle applies, where the testator owns an undivided share, and there is a description restricting the property devised to his interest followed by a more comprehensive description. The estate devised to the testator was an estate in reversion. The charge for the payment of the three thousand dollars may be applied and confined to this estate in reversion upon a fair reading of the will and without violence to its purpose. Such appears to have been the real intent of the testator as extracted from all the provisions and dispositions of the will. But, if it were ambiguous or doubtful, the interpretation would be the same.

2. More than two years had expired from the death of Clarissa Toney before the assignee in bankruptcy was admitted a party defendant, and the filing of his cross-bill. If at this time the statute of limitations has operated a bar, it is as available to the defendants, as if the cross-bill were a new and independent suit. The claim of the assignee is barred by the statute of limitations of two years as to the parties claiming adversely.—Rev. Statutes U. S. § 5057; *Mohr v. Lamb*, 69 Ala. 180; *Evans v. Richardson*, 76 Ala. 329; *Blumenstiel on Bankruptcy*, 238. The averments of the cross-bill are insufficient to relieve the assignee from the imputation of unreasonable delay. It is not shown how or when he first came to a knowledge of facts which would put him on inquiry; and no facts constituting fraudulent concealment are averred. *James v. James*, 55 Ala. 526.

As to the claim of the assignee in bankruptcy the decree is affirmed, but reversed in all other respects. A decree will be here rendered that the complaint has a lien on the undivided two-thirds share of the land in the bill mentioned, which was devised to Samuel W. Coons, by the will of Martha E. Coons, for the three thousand dollars with interest from his death charged thereon by his will, and that the lands be sold by the

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register for the payment of the sum of five thousand and thirty-eight 66-100 dollars, the amount found by the chancellor to be due, with interest from June 2, 1886, the date of his decree, and dismissing the bill as to the other one-third interest. The appellee, as administrator, will pay the costs of appeal in this court and in the Chancery Court. The costs of suit which were incurred at the instance of the assignee in bankruptcy, will be paid by such assignee, and the other costs of suit in the Chancery Court will be paid out of the proceeds of sale.

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Bill in Equity by Surety on Tax Collector's Official Bond, to enforce Statutory Lien on Property of Deceased Principal.

1. *Official bond of tax-collector ; subrogation of surety to rights of State or county against property of principal.*—A surety on the official bond of a defaulting tax-collector, paying the amount of his principal's default, is entitled, on general equitable principles, to be subrogated to the rights of the State or county, and to have the statutory lien created by the bond enforced for his indemnity, against his principal, co-sureties, and purchasers with notice ; and if he pays a judgment rendered against his principal and co-sureties, taking an assignment of it to himself, the statute (Code, § 3418) gives him the right to assert, "in law or equity, any lien or right against the principal debtor which the plaintiff could assert if the debt had not been paid."

2. *Same ; lien of bond as against homestead.*—The lien created by the official bond of a tax-collector, as declared by statute (Code, § 403), extends to the homestead owned and occupied by him at the time of the execution of the bond, and is operative as against subsequent purchasers with notice. (CLOPTON, J., *dissenting*.)

APPEAL from Chilton Chancery Court.
Heard before the Hon. N. S. GRAHAM.

BRAGG & THORINGTON, for appellant.—1. In October, 1875, James A. Dudley, being tax-collector of Chilton County, executed his bond, with Moses Simmons and others as sureties thereon. In May, 1877, said Dudley made default in the payment of county taxes, for the amount of which default the county, in 1878, recovered judgment against Dudley and his sureties. Execution was issued on this judgment against Simmons, who paid it and took a transfer of the judgment to himself. This bill is filed to enforce that judgment against Dud-

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ley and the co-sureties with complainant on his bond, and against parties who had purchased property from Dudley after the execution of his bond. Two of these latter parties, Mrs. Callens and Mrs. Baker, defend on the ground that the property purchased by them respectively was, at the time of the purchase, the *homestead* of said Dudley, and could not be subjected to the debt or liability of Dudley. 2. Homestead exemptions under the Constitution apply only to liabilities arising out of contracts, and not from torts. The proof shows that Dudley owned the property purchased by Mrs. Baker, in 1876, and that it did not become his homestead till 1877, so that it became impressed with the lien of the bond before it became exempt as a homestead, if exempt at all.—See *Newbold v. Smart*, 67 Ala. 326. The liability of Dudley does not arise from the bond, but from his default and wrong. The bond is intended simply to indemnify the State against loss by the tortious act of the tax-collector.—*Meredith v. Holmes*, 68 Ala. 190; *Vincent v. The State*, 74 Ala. 274; Thompson on Homesteads, § 190. 3. In the United States, where a preference is given to the government, the principle has prevailed that a surety, on payment, shall be subrogated to the United States and to the preferences given to the government.—Dixon on Subrogation, pp. 120–1; *West v. Creditors*, 3 La. An. 529; *Dias v. Bonshand*, 10 Paige, 445; *Hunter v. U. S.*, 5 Peters, 182; 4 Randolph, 438.

J. M. FALKNER, WM. A. COLLIER, J. S. EDWARDS, and WATTS & SON, *contra*, cited Herman on Ex., § 297; *Cooper v. Galbraith*, 3 Wash. C. C. 546; *Conway v. Nolte*, 11 Mo. 74; *Robinson v. Garth*, 6 Ala. 208; *Lehman, Durr & Co. v. Alford*, 76 Ala. 526; *Knighton v. Curry*, 62 Ala. 404; *Green v. Marks*, 25 Ill. 221; 68 Ala. 190.

SOMERVILLE, J.—The defendant, Dudley, was tax-collector of Chilton county, and, in October of the year 1875, executed his official bond in such capacity, and in the form prescribed by statute, with Moses Simmons, the complainant's intestate, and others as sureties. In the years 1876 and 1877, Dudley, having collected a large amount of tax-money due the county, failed to pay over such funds to the county treasurer, within the time fixed by law, and thereby became a defaulter to the county on May 1st, 1877. A summary motion was instituted in the Circuit Court against Dudley and his sureties, in the name of Chilton county, and judgment was rendered against them in the following year, 1878, for the amount of such defalcation, with interest, damages, and costs—being

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about the sum of fourteen hundred dollars. This proceeding was taken under section 3396 of the present Code.

Simmons, as surety, paid this judgment, and it was assigned to him by the plaintiff in the judgment, Chilton County, pursuant to the requirement of section 3418 of the Code of 1876, which expressly preserves the full vitality of such judgments as against the principal debtor, in favor of the surety paying or satisfying them, under certain qualifications not affecting this case.

The present bill was filed by Simmons, the suit being afterwards revived in the name of his administrator, and its purpose is to enforce the lien created by statute in favor of the original plaintiff, for the benefit of the complainant, as a surety, against the tax-collector, the co-sureties on his bond, and certain alienees, of property fraudulently conveyed by such collector after the execution of his bond. It is provided by statute—and such was the law in force at the time of the giving of defendant's, Dudley's, bond—that “the bond of the tax-collector shall operate, *from its execution*, as a lien in favor of the State and county on the property of such tax-collector for the amount of any judgment which may be rendered against him in his official capacity for the State or county taxes, and on the property of his sureties from the date of his default.” Code, 1876, § 403.

It has been settled by this court that where the surety of a tax-collector makes good the default of his principal, even before judgment rendered for such default, he is entitled to be subrogated, on equitable principles, to the rights of the State or county, and to have the lien of the bond, created by this statute in favor of the State or county, enforced for his own indemnity, against the principal, the co-sureties, and the purchasers from them, who have notice of the existence of such lien.—*Knighton v. Curry*, 62 Ala. 404. And the joinder of these various parties as co-defendants to such a bill has been decided not to render it objectionable on the ground of multifariousness.—*County of Dallas v. Timberlake et al.*, 54 Ala. 403. It can not in our opinion affect the equity of such a bill save to strengthen it, that the judgment rendered against the collector has been assigned by the plaintiff in it to the surety. The very purpose of the statute authorizing this assignment was to enlarge and not to diminish the surety's rights, at least against the principal debtor. It not only authorizes the assignee to use the name of the original plaintiff for its collection by the issue of execution against the principal; but he may also “assert in law or equity any lien or right against the principal debtor which the plaintiff could assert, if the debt had not been paid.”—Code, 1876, § 3418. This he may ob-

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vously do in his own name, in a court of equity certainly, as was done in *Vanderveer v. Ware*, 65 Ala. 606.

These principles settle the general equity of the bill, as involving a subject-matter properly within the jurisdiction of a court of chancery, and show that the chancellor erred in its dismissal.

There is another question, however, presented by the record. Two of the defendants, Mrs. Callens and Mrs. Baker, are shown to be purchasers of lots which constituted a portion of the homestead of their co-defendant, Dudley, which was owned and occupied by him as such, at the time of the execution of his bond as tax-collector in October, 1875. It is not denied that they are chargeable with notice of the lien on the land, if by law it was fastened on the homestead. The question then is, whether the homestead of the principal debtor, the tax-collector, was subject to condemnation to satisfy this demand. Did the execution of the bond, under the influence of the statute, operate to fix the lien on property which is exempt from sale for ordinary debts, under the Constitution and laws of this State?

The rights of the complainants in this particular, as we have shown, are precisely commensurate with those of the original plaintiff in the judgment, the County of Chilton. As assignee of the county, he is empowered to "assert, in law or equity, any lien or right against the principal debtor, which the plaintiff could assert, if the debt had not been paid."—*Vanderveer v. Ware*, *supra*; Code, 1876, § 3418. This language of the statute is very broad and explicit, and can admit of but one interpretation. It puts the complainant in the shoes of the County of Chilton, and permits no defense against him which could not have been successfully urged against the original plaintiff, had there been no assignment to, or payment by the surety.

It is our opinion that the homestead exemption law is not operative against the present liability. The Constitution and statutes apply only to sales on execution, or other process from courts "for any debt contracted." It has no application to judgments based on torts, or liabilities in the nature of torts. Const., 1875, Art. X, Sec. 2; Code, 1876, § 2820. The past decisions of this court commit us fully to this construction. In *Meredith v. Holmes*, 68 Ala. 190, it was decided that a defendant's homestead was not exempt from levy and sale under execution on a judgment based on a recovery of damages in an action of trespass. In *Williams v. Bowden*, 69 Ala. 433, a like ruling was made as against a judgment recovered for a penalty given by statute against a mortgagee for failure to enter satisfaction of a mortgage, after its payment, pursuant

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to the requirement of section 2223 of the Code of 1876. And in *Vincent v. The State*, a claim of exemption was disallowed on a bill being filed by the State against a defaulting public officer, for the recovery of money belonging to the State, which he had converted to his own use. This ruling was based, not on any alleged prerogative of the State, but upon the broader ground that the conversion of the money was both a tort and a crime, and no exemption of property could be claimed or allowed against such a liability.

In *Whiteacre v. Rector*, (29 Gratt. 714), 26 Amer. Rep. 420, the Virginia Court of Appeals, under a constitutional provision precisely like our own, decided that a homestead exemption could not be claimed as against a fine due the State for a violation of its criminal laws. While this court, in *The State v. Allen*, 71 Ala. 543, admitted, *arguendo*, the probable correctness of this view as against the principal debtor, who was convicted and fined, its application to the sureties was denied on the ground that the confessed judgment for the fine was purely contractual as to them—a mere promise to pay money.

In *Kirkpatrick v. White*, 29 Penn. St. 176, a constable, against whom an execution was issued upon a judgment, obtained for negligence in failing to return an execution in another cause, was held not to be entitled to the benefit of the exemption laws.

There are many other decisions in various States analogous to the foregoing.—Thompson on Homesteads, §§ 380, 383.

The present liability, so far as the principal debtor is concerned, is in the nature of one *ex delicto*. It is not a mere suit on the tax-collector's bond, but a summary action for money presumptively converted, with interest, a penalty of ten *per cent.* damages, and costs added. It is a judgment for an official defalcation, not for "a debt contracted," within the meaning of the constitution, or the statutes, as much so as either an ordinary penalty, or a fine, for either of which an action of debt in mere form would lie.

The objection, that this result can only be reached by working out contribution among joint wrong doers, is without force. The tax-collector, who is the defaulter, is here the only wrong doer. While he has been guilty of an offense against the public revenue, which is made by statute either a misdemeanor or felony, according to the circumstances of the case, the sureties on his bond are chargeable with no such criminal dereliction. *Britton v. State*, 77 Ala. 202; Code, 1876, §§ 4265, 4266; 414. They have contracted with the county, and with each other, to make good this default, and out of these contractual relations, grows the jurisdiction of equity in this case. But the rights of

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the complainant, in the matter of exemptions, grows more particularly out of the statute and the assignment to his intestate, of the judgment recovered by the county of Chilton. Against this, as we have shown, there was no homestead exemption which could be lawfully claimed.

These views necessarily lead to a reversal of the decree of the chancellor, which is accordingly adjudged, and the cause is remanded, that further proceedings may be had in accordance with the principles announced in this opinion.

CLOPTON, J. (*dissenting*).—The nature and importance of the question call for a brief statement of the reasons, which compel me to dissent from the conclusion, that the lien created by the official bond of the tax-collector attached to a homestead which he had sold and conveyed before suit on the bond.

Section 2 of article 14 of the constitution of 1868, which was in force at the date of the bond, provides, that any lot in a “city, town or village, with the dwelling and appurtenances thereon, owned and occupied by any resident of this State, and not exceeding the value of two thousand dollars, shall be exempted from sale, on execution, or any other final process from a court, for any debt contracted after the adoption of this constitution. Such exemption, however, shall not extend to any mortgage lawfully obtained, but such mortgage or other alienation of such homestead, by the owner thereof, if a married man shall not be valid without the voluntary signature and assent of the wife to the same.” Under our constitution, the rule has been rejected, which prevails in some of the States, that a lien, however created, attaches to the homestead, but remains dormant during its occupancy, and comes into vitality on its cessation. While actual occupancy as a homestead is requisite to the claim of exemption, the owner’s power of alienation, when so occupied, is unrestrained except by the requirement of the voluntary signature and assent of the wife, acknowledged and certified as provided by statute. A creditor has no right to subject the homestead, because the owner and occupant may have conveyed it to another, though the conveyance may be voluntary, or made under circumstances, which stamp it as fraudulent, being without injury to him. But a conveyance without such signature and assent of the wife is a nullity conferring no rights, and if, on the execution of such conveyance, the owner abandons the homestead, the lien, *eo instanti*, attaches.—*Fellows v. Lewis*, 65 Ala. 343; *Alford v. Lehman*, 76 Ala. 526.

In construing constitutions, the form or manner of expression should not be regarded, so much as the nature and purposes of the provisions, the evil to be remedied, and the benefit

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to be secured—the end to be accomplished.—*Carroll v. State*, 58 Ala. 396. A State constitution should be interpreted in the light of the common law, when pertinent, and of its predecessors, if any. Exemptions of property from the payment of debts, which, in the absence of statutory or constitutional provisions, would have been subject, has been the policy of the State from its earliest organization; and from time to time statutes have been enacted enlarging the kind and *quantum* of the property exempted. Provisions were incorporated for the first time in the organic law, expressly declaring exemptions, in the constitution of 1868. These statutory and constitutional exemptions are founded in a humane and benevolent policy, looking to the promotion of the public weal, by protecting the wife and children against the improvidence of the husband and father, and securing to the family a home, a shelter from misfortune and adversity; and in furtherance of this beneficent policy, in which they originated and have been perpetuated, they have always received a liberal construction.

The security and protection of the homestead seem to have been an object of special care, and a special end to be accomplished. Though personal property is also exempted, the owner retains unrestricted power to transfer, or to create liens thereon; whilst as to the alienation of the homestead, preventive power is conferred on the wife—no mortgage or other alienation shall be valid without her voluntary signature and consent, whatever may be its form. A mere contract to alienate, though operating if it were valid as a conveyance of an equitable title, and having the voluntary signature and assent of the wife, does not give a right to insist upon a conveyance of the legal estate. The courts cannot compel the wife's performance.—*Jenkins v. Harrison*, 66 Ala. 345; *Phillips v. Stauch*, 20 Mich. 369. It will scarcely be controverted, that an equitable mortgage comes within the letter and spirit of the constitutional provision, and that no lien attaches to the homestead under such mortgage, which the courts will enforce, certainly without the signature and assent of the wife. The lien on the property of the tax-collector, which the statute declares shall be created by the execution of his official bond, is founded in *contract*, as much as that of a mortgage would be, and on this ground are based the right of subrogation, and the power of the court to enforce the lien. In *Knighton v. Curry*, *supra*, it is said: "The statute subjecting the property of a tax-collector to a lien for any default he may commit, the lien attaching on the execution of his official bond, is of the same dignity it would be, if in express words it was written as a stipulation of the bond. If so written, the bond would only repeat and declare its legal effect and operation. And if so written, in the absence of the statute, it

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would operate as an equitable mortgage, and as such a court of equity would enforce it.”—*County of Dallas v. Timberlake*, 54 Ala. 403. A lien thus created and of such nature can have no more force or operation to deprive the owner of the homestead, than an equitable mortgage would have, or than if the lien, independent of the statute, were expressly stipulated in the bond. In Illinois, the statute provided, that the homestead shall be exempt from levy and forced sale for debts contracted after a stated time; “and no release or waiver of such exemption shall be valid unless the same shall be in writing, subscribed by such householder, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged.” The bond of the tax-collector was also declared by statute to be a lien on all his real estate, within the county, at the time of filing thereof. Under these statutes, it was held that the lien can not be enforced as against the homestead; that “the homestead right is protected against all liens and sales, and against all modes of conveyance, whether by deed absolute or mortgage, unless it shall be released or disposed of in the mode prescribed by the act.”—*Hume v. Gossett*, 43 Ill. 297. The constitution does not secure the homestead as a personal privilege of the debtor, but as an absolute right, essential to the well being of the household, of which he cannot be deprived, except by alienation with the voluntary assent of the wife, accompanied by her signature. By express provision, the exemption does not extend to a mortgage lawfully obtained, and executed in the mode prescribed. The section being general, conferring an immunity, and expressly excepting a specified lien, indicates the exclusion of all other liens, unless otherwise provided in the constitution.—*Expressum facit, cessare tacitum*. Moved by the frequent necessity of a waiver of exemptions, the framers of the constitution of 1875, while incorporating therein *verbatim* the homestead exemption as declared by the former constitution, provided another and additional mode of waiving the exemption, but still requiring the signature of the wife. In view of the policy of exemptions, and giving the constitutional provisions a liberal construction, the inference arises, that it was intended, the owner being a married man, that the household should not be deprived of the homestead, directly or indirectly, by being subjected to debts contracted by the husband, in any mode other than specifically prescribed, or otherwise authorized by the constitution. To this end, the voluntary signature and assent of the wife in the mode provided is essential. Under the constitution, the legislature could not declare a lien, to be created by the contract of the husband as security for a pecuniary liability, which the courts can enforce against the homestead, without regard to the

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signature and assent of the wife. I do not wish to be understood as intimating a doubt of the correctness of the decisions, which hold, that a right of exemption can not be asserted, under the constitution and the statutes, against a judgment for a tort. No lien arises in such case until judgment and execution thereon. But I do not regard, as a logical sequence from this rule, that a lien, which does not necessarily depend on the commission of a tort, but is created by the execution and filing of the bond, and rests in contract, should be declared and enforced on a homestead, which the tax-collector has sold and conveyed before judgment is rendered against him in his official capacity—a homestead which can not be sold by virtue of the execution lien, and can be subjected only by enforcing a prior contractual lien. No reference is intended in this opinion to the exemption so far as enlarged by mere statutory provisions, as to which, it may be, different rules should be applied.

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Creditor's Bill to Subject Proceeds of Policy of Life Insurance on Deceased Debtor.

1. *Assignment of judgment, on payment, to surety; creditor's right to pursue equitable assets.*—When a judgment against principal and surety is paid by the latter, and then assigned to him by the plaintiff, the surety “may assert, in law or equity, any lien or right against the principal debtor which the plaintiff could assert if the debt had not been paid” (Code, § 3418); and he may therefore maintain a bill in equity to reach and subject property fraudulently conveyed by his deceased debtor while living, on averment and proof of a deficiency of legal assets.

2. *Proof of payment of premiums.*—When a creditor files a bill in equity, to reach and subject to the satisfaction of his debt the proceeds of a policy of insurance on the life of the deceased debtor in favor of one of his children, and the answers deny that the premiums were paid by the debtor, while the *onus* of proving payment is on complainant, positive proof is not required, but it may be established by circumstantial evidence; nor is it incumbent on him to show the sources from which the debtor derived the money.

3. *Policy of insurance by debtor, in favor of child, considered as voluntary conveyance at suit of creditors.*—A policy of insurance procured by a debtor on his own life, in favor of one of his children, not being within the protection of the statute (Code, §§ 2733-4), is a mere voluntary conveyance, and is void as against his existing creditors, though no fraud may have been intended.

4. *Who is creditor.*—When a surety pays a debt after it has been reduced to judgment, the payment relates back to the date of the suretyship, and constitutes him a creditor from that time, with the right to set aside any intermediate voluntary conveyance executed by his principal.

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5. *Policy of insurance by debtor, in favor of child, considered as conveyance on valuable consideration.*—When a father, being indebted to one of his children, procures a policy of insurance on his own life in her favor, as security for, or in payment of his indebtedness, the transaction will be sustained against the attack of his other creditors, as being founded on valuable consideration, provided the limit of reasonable adequacy and sufficiency be not exceeded; but the relation of debtor and creditor does not exist between them, because he is indebted, as executor, to the estate of his deceased father, which was bequeathed to him and his mother equally, while his daughter is a legatee under the will of his deceased mother.

6. *Policy of life insurance; nature of contract.*—A policy of life insurance is not a contract of insurance for a single year, with the right or privilege of renewal annually, or as each premium becomes due and is paid; but is a single and entire contract, having its inception in the issue of the policy, continuing during the life of the assured (or other term), and payable at death, but subject to be discontinued by the non-payment of premiums as agreed.

7. *Same; extent of creditor's right to subject.*—After the death of the debtor, having procured a policy of insurance on his own life in favor of one of his children, an existing creditor may reach and subject in equity, not only the premiums paid by the debtor, but the proceeds of the policy to the extent of the debt; and the money having been loaned out on note and mortgage, by the guardian of the infant, the creditor may pursue it, and make the mortgage available for his own benefit.

8. *Revivor of suits, in law or in equity.*—The statute which requires actions at law to be revived within eighteen months after the death of a party (Code, § 2908), does not apply to suits in equity, but leaves them to be governed by rules which prevail in equity.

9. *Non-claim, as bar to foreclosure of mortgage.*—The failure to present the debt as a claim against the estate of the deceased mortgagor, within eighteen months after the grant of letters of administration (Code, § 2597), is no bar or defense to a bill for the foreclosure of the mortgage.

APPEAL from Marshall Chancery Court.

Heard before the Hon. H. C. SPEAKE.

This case came to this court upon a ruling of the chancellor on demurrer, and is reported in 63 Ala. Reports, page 33, where the nature of the suit fully appears. The present case is now before this court after final hearing on pleadings and proof—on its merits, at November term, 1884. It having been held, on demurrer, that the policy in this case being in favor of *one child* only, whilst the assured had a wife and several children, did not fall within the provision of the statute (§§ 2733–4, Rev. Code, 1876), the contention now is, whether the proceeds of the policy in question can be subjected to the demand of the complainant creditor upon principles independent of said statute. The chancellor decreed that the complainant was entitled to have the debt of his estate paid out of the proceeds of the policy of insurance on the life of the debtor, Robt. Fearn, and for that purpose directed a sale of the property embraced in the Donegan mortgage. This appeal is from that decree.

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L. WYETH, HUMES, GORDON & SHEFFEY, and WATTS & SON, for appellants.--1. The failure of the complainant to revive his suit against the administrator and heirs of James Donegan, deceased, within eighteen months, operated a bar to the further prosecution of this suit. The charge of fraud creates no exception to the requirement of the statute of non-claim. *Yniestra v. Tarleton*, 67 Ala. 126; *Taylor v. Robinson*, 69 Ala. 269. When the statute of non-claim is pleaded the burden of proving presentation is on the creditor.—*May v. Parham*, 68 Ala. 253. 2. Robert Coles paid the last premium with his own means and for the beneficiary of the policy. This payment should not accrue to the benefit of Robt. Fearn or his creditors. The payment of each premium is a renewal of the contract of insurance, and, in a limited sense, the making of a new contract.—*Thompson v. Cundiff*, 11 Bush. (Ky.) 567; *Eq. L. Ass. v. McLennan*, 4 Cent. L. J. 150. The recovery by complainant in no event should exceed the amount of the premiums presumptively paid by Robt. Fearn, or the value of the policy when the last payment was made.—*Lan-drum v. Knowles*, 22 N. J. Eq. 594; *Leonard v. Clinton*, 26 Hun. 288-92; *Clark v. Durand*, 12 Wis. 223. If an insolvent husband or father pays premiums on a policy of insurance, the amount so paid, with interest, is liable to the creditors of the husband or father.—*In re Bean et al* (U. S. C. C. Dist. Miss.) 1 Cent. L. J. 607. See also, 2 Dillon C. C. 120; *Gould v. Emerson*, 99 Mass. 154; *Glanz v. Gloeckler*, 10 Ill. App. 484; *Ingles v. New Eng. Mut. L. Ins. Co.*, 27 Fed. Reporter, 249. 3. Appellee has failed to prove that the premiums paid upon the policy of insurance were paid by Robt. Fearn out of money belonging to him, which was liable to the payment of the debts of his creditors.—*Felrath v. Schonfield*. 76 Ala. 199-203. There is no absolute presumption of law that a voluntary conveyance made on a meritorious consideration is fraudulent and void as to existing creditors.—*Lerow v. Wilmarth*, 9 Allen, 382. 4. The record shows that the beneficiary of the policy, Kate Coles Fearn, was a creditor of the insured, and therefore the insurance was not voluntary, but was founded on a valuable consideration as between the insured and the beneficiary; and a failing creditor has the right to prefer one creditor to another.—*Crawford v. Kirksey*, 55 Ala. 282; *Chamberlain v. Dorrance*, 69 Ala. 40; *Hodges Bros. v. Coleman*, 76 Ala. 103; *Meyer v. Sulzbacher*, 76 Ala. 120. The case now presented is different from that made on former appeal on demurrer. There it was held that a voluntary conveyance was void as to existing creditors; here the proof shows that the beneficiary, Kate Coles Fearn, was a creditor for value. Then, by the averment, which the demurrer conceded, it ap-

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peared that Robert Fearn had invested more than \$500 annually in premiums on this policy ; now, it is shown that that averment is untrue. 5. As to *constructive* as opposed to *actual* fraud, and effect, see *Wood v. Goff*, 7 Bush, 63 ; *Thompson v. Cundiff*, 11 Bush, 567 ; *Short v. Tinsly*, 1 Met. 404 ; *Boyd v. Dunlap*, 1 Johns. Ch. 478 ; *Clements v. Moore*, 6 Wall. 312 ; 19 Hun. 115.

CABANISS & WARD, *contra*.—1. The equity of this case is settled by *Fearn v. Wood*, Adm'r, 65 Ala. 33. 2. As to the controverted question of payment of premiums on policy of Robert Fearn, whether paid with his own means or otherwise, is plain by the evidence set out in the record. 3. As to fraudulent intent of Robert Fearn. If Robert Fearn had been indebted to his daughter, Kate Coles Fearn, she could not have availed herself of that to defeat the resort of his creditors to property fraudulently conveyed to her. A fraudulent or voluntary conveyance is good against the grantor and his creditors who do not assail it, subject to such creditors as choose to subject it to the payment of their debts.—Bump on Fraud. Con. (2d Ed.) 595 ; *Henriques v. Hone*, 2d Ewd. Ch. R. 123 ; 7 Paige, 503. 4. Complainant was not limited to the amount of premiums paid by Robt. Fearn on the policy. The whole amount of the policy was subject to the payment of his debts. Bump. on Fraud. Con. 609. 5. The court erred in overruling the demurrer of Wm. H. Donegan, to the bill of review.—65 Ala. 501 ; 49 Ala. 403. 6. Statute of non-claim does not bar foreclosure of mortgage.—*Inge v. Broadman*, 2 Ala. 331 ; *Dooley v. Villalonga*, 61 Ala. 129–133. 7. Complainant was not a party to the suit of *Weeden, Adm'r, v. Robt. Fearn*, and was not bound by the decree.—*Bank v. Hodges*, 12 Ala. ; *Humes, Assignee, v. Snuggs*, 4 Otto. There was no error in final decree.—9 Ala. 463.

CLOPTON, J.—In July, 1873, Eliza Lee Fearn, as guardian of Kate Coles Fearn, received from the Peidmont and Arlington Life Insurance Company about nine thousand and five hundred dollars, being the proceeds of a policy of insurance, issued by the company in July, 1870, on the life of Robert Fearn. The policy was payable to Kate Coles Fearn, who was an infant child of the assured. Eliza Lee Fearn loaned eight thousand dollars of the money received on the policy to James J. Donegan, who executed to her a mortgage on real estate to secure the payment of the loan. The bill is brought by appellee, as administrator of Thomas Fearn, to subject the money in the hands of Donegan to the payment of a judgment which was recovered by Eliza Levert, as exec-

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utrix of Francis Levert, in April, 1871, against Robert Fearn.

The judgment was founded on a bond for the payment of money, made by Robert Fearn and Thomas Fearn in 1857, and payable twelve months after date. Complainant, whose intestate was a surety on the bond, paid the demand, and the judgment was assigned to him as such administrator by the attorneys of record of the plaintiff, as authorized by the statute. Robert Fearn died in March, 1873, and his estate has been declared insolvent. The bill alleges, and the proof shows, a deficiency of legal assets to pay the demand. By section 3418 of the Code, being the statute under which the judgment was assigned, the complainant is authorized to assert in law or equity any lien or right against Robert Fearn, the principal debtor, which the plaintiff in the judgment could assert, if the debt had not been paid. A court of equity will intervene at the instance of a creditor, on averment and proof of a deficiency of legal assets, to subject to the satisfaction of his debt property fraudulently conveyed by a deceased debtor in his lifetime.—*Battle v. Reid*, 68 Ala. 149; *Sharp v. Sharp*, 76 Ala. 312.

At the time the policy of insurance was procured, Robert Fearn had a wife and several children living. The policy was issued in favor of only one of his children. When this case was before the court on a former appeal, taken from a decree overruling a demurrer to the bill (65 Ala. 33), it was held, that the policy is not protected against the claims of creditors by the statute, which authorizes a married woman to cause the life of her husband to be insured for the benefit of herself and her children, free from the claims of the representatives of the husband or any of his creditors.—Code of 1876, §§ 2733, 2734. It is said: "The policy, in this case, was procured by the husband in favor of *one* of his several children. The statute designed it for the benefit of the *wife* and *children*. It is not, therefore, in compliance with the requirements of the statute, and is not such a policy as justifies the invocation of the statute for its protection." The equity of the bill was sustained, which involved the right of complainant to maintain the suit, and his title to relief, if the allegations were admitted or proved. The case, therefore, must be considered and determined on principles which apply, independent of the statute.

The denials of the answers made it incumbent on complainant to prove that the premiums were paid by Robert Fearn with his own funds; and it is insisted, that the evidence is insufficient to this end. Positive proof is not required. It may be established by circumstantial evidence. Neither is it incumbent on complainant to show the sources

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from which he derived the money. The agent of the company testifies, that all the premiums were paid by Robert Fearn, either in person, or by others for him. He was engaged in cultivating, in partnership with Ferguson, a large plantation from 1866 to 1872, inclusive. Humphrey, the agent of the commission merchants of the partnership, states that he made advances to Fearn, and paid premiums to the insurance company, which were charged to Fearn & Ferguson, and which they shipped cotton to meet. Eliza Fearn, his wife, and Coles, his brother-in-law, and the administrator of his estate, both state they do not know from what source he derived the money to pay the premiums. The last premium was paid by Humphrey, and charged to Coles. On this evidence, we are forced to conclude, in the absence of opposing or explanatory proof, that Robert Fearn paid, with his own funds all the premiums, except the last. The effect of the manner, in which the last premium was paid, will be considered hereafter.

The procurement of the policy of insurance by Robert Fearn in favor of his child, and the payment of the premiums with his funds, constitute a gift to her, a voluntary conveyance based on parental affection, which is void as to his existing creditors, though no fraud may have been intended. It is a voluntary provision, effected by converting to her benefit money, which in equity and good conscience should have been paid to his creditors. Though the law regards the parental duty of maintenance, and the consequent duty of making provision for the future, when the father may no longer exercise protecting care, it subordinates the discharge of these duties to obligations to his creditors; and declares void, as to them, any voluntary appropriation of property, not authorized by legally expressed exemptions, or privileges, generally allowed on considerations of public policy. The bond, on which complainant's intestate was surety, had pre-existed, and was existing at the time of, the creation and issue of the policy. The subsequent payment of the debt relates to the date of the suretyship, and constitutes him a creditor, who may avoid a fraudulent conveyance, though made during the period his claim was contingent.—*Jenkins v. Lockard*, 66 Ala. 377; *Keel v. Larkin*, 72 Ala. 493. Whether complainant be regarded as a simple-contract creditor, or his rights arise from the provisions of the statute by authority of which the judgment was assigned to him, he is entitled to avoid, as offending his rights, the policy of insurance, unless some superior or equal equity of the beneficiary supervenes.

Such equity is claimed to arise on the following facts: Robert Fearn, Sr., died in 1856, leaving a will, bequeathing

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and devising his entire estate to his wife, Eliza Maria Fearn and Robert Fearn, who qualified as executrix and executor. Eliza Maria Fearn died in 1865, having made a will, giving her property in equal shares to Eliza Lee Fearn and her four children, Kate Coles Fearn being one of the children. Robert Fearn continued to act as executor of his father's will until October, 1870, when he resigned, and Weeden was thereafter appointed administrator *de bonis non* with the will annexed. Weeden, as such administrator filed a bill against Robert Fearn for a final settlement of his administration of the estate of his father. Robert Fearn having died pending the suit, it was revived against Robert Coles as his administrator, against whom a decree was rendered in December, 1873, for about the sum of fifty-four thousand dollars. It is insisted, that on these facts, Robert Fearn was indebted to Kate Coles Fearn, when he caused the policy to be issued in her favor; that he had in possession funds, which equitably belonged to her, out of which he paid the premiums, and that thereby a title to the policy vested in her immediately on its issue, founded on a valuable consideration.

A failing or insolvent debtor has the right to prefer, within proper bounds, one or more creditors to the exclusion of the others; and if it is true, that Robert Fearn was indebted to his daughter, he had the right to cause a policy of insurance on his own life to be issued in her favor, as security for, or in payment of such indebtedness, provided the limit of reasonable adequacy and sufficiency was not exceeded. And it may be, that her guardian having possession of the proceeds of the policy, a court of equity, in the absence of actual fraud, would regard her equity as equal to that of complainant, and require satisfaction of her demand, though the policy was intended as a voluntary provision.—*Oliver v. Moore*, 23 Ohio St. 473. But is she a creditor in the meaning of these rules? She is not a legatee or devisee under the will of Robert Fearn, Sr., and has no claim or right to any of the property of his estate as such. The decree and the proceeds thereof constituted assets of his estate, the legal title to which was in his administrator, to whom the debt was due and payable. She could have maintained no suit to make Robert Fearn account for a *devastavit* as executor of his father's estate, and was incapable of acquitting or discharging him from such liability or any part thereof. Her claim is under the will of Eliza Maria Fearn, to whose personal representative Weeden must account for her portion of the personal assets of the estate of Robert Fearn, Sr. The relation of creditor and debtor does not arise on the facts; and we would have considered it unnecessary to allude thereto, had not counsel strenuously contended for such

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relation as creating an equity in favor of Kate Coles Fearn. The same observations apply to the asserted equity, based on the possession, and use in the payment of premiums of trust funds. The relation of trustee and *cestui que trust* did not exist between Robert Fearn as the executor of Robert Fearn, Sr., and Kate Coles Fearn as legatee and devisee under the will of Eliza Maria Fearn. Furthermore, it appears from the record, that Robert Fearn resigned his executorship in October, 1870. Only one premium had been paid on the policy in question prior to his resignation—the premium paid in August, 1870, at the time the policy was issued. The other premiums were paid subsequently, and when he did not have possession or control of the estate; and there is no evidence satisfactorily showing, that he ever used the funds of the estate in the payment of any premiums.

But if it were true, that Robert Fearn was indebted to Kate Coles Fearn, the extent of her equity would be the payment of such indebtedness. As the estate of Robert Fearn, Sr., owed no debts, Robert Fearn was entitled, under the will of his father, to one-half of the proceeds of the decree, and by a sale of his interest in real estate, twenty-five thousand dollars were realized and paid on the decree. The amount of indebtedness, if any, is her distributive share, being one-fifth, of the difference between the sum of one-half of the decree and the sum paid by the sale of the real estate. After satisfying the demand of complainant, there will remain, in the possession of her executrix, of the proceeds of the policy, more than enough to pay this amount.

The remaining questions are, the measure and kind of relief, to which the complainant is entitled—whether to subject the proceeds of the policy, or only a sum equal to the amount of the premiums paid by Robert Fearn with interest, and to enforce the payment by a foreclosure of the mortgage? Appellants contend, that the measure of relief is the amount of premiums paid with interest; and rest the contention on the proposition, that a contract for life insurance is an insurance for one year, with the privilege of continuing it in force by successive periodical payments of premiums; that is, each payment is a renewal of the contract, and in a limited sense, the making of a new contract. Though this view has been taken by respectable authorities; we think the position can not be maintained. The contract of life insurance has its inception in the issue of the policy, and is a complete and entire contract for the life of the assured, continuing during life, and payable at death, when no earlier definite period is fixed, but subject to be discontinued by non-payment of the premiums as agreed, such payments being conditions subsequent. The annual premium is not paid

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in consideration of insurance for a single year, and its payment is not a condition precedent to renewal. Each premium constitutes a part of the consideration of the contract, as one and entire, and the amount is fixed and regulated by the prospective duration of the life of the assured, which enters as an element into the contract. As has been said: "The whole premiums are balanced against the whole insurance." On this character of the contract, depends its continuance in force by a mere waiver of the discontinuance which would otherwise ensue on non-payment of the premiums; and on this construction are founded the decisions of this court, respecting the interest which vests, when the policy is issued, in the person for whose benefit it is taken out.—*N. Y. Life Ins. Co. v. Statham*, 93 U. S. 24; *Drake v. Stone*, 58 Ala. 133. It follows, that the payment of the last premium, if made by Coles under the circumstances, and for the benefit of the persons as testified by him, does not materially change the nature of the provision. The payment was made without the request, consent, or knowledge of the assured, or of the beneficiary. Payment by a stranger, without any agreement or understanding with the person entitled to its benefit, confers no interest or title to the policy. *Bliss on Life Ins.* § 328. The last payment was made by Humphrey to the agent of the company on his own responsibility, and charged in a memorandum to Robert Fearn, and afterwards, by direction of Coles, was charged to him. Such assumption of the payment does not operate to render unavailing the provision by Robert Fearn, and convert the policy into a provision as made by Coles. His right or claim does not exceed reimbursement or the amount paid.

The courts, which construe the contract of life insurance as an insurance for a single year with a right or privilege of renewal, may consistently hold, that the creditor can only subject the amount of premiums paid by the assured with interest; but from our construction of the contract, the liability of the insurance, procured by the use of the means of the debtor, seems to logically follow. Property received by the grantee in exchange for that fraudulently conveyed, will stand in place of the conveyed property, and may be subjected by the creditors of the grantor.—*Abney v. Kingsland*, 10 Ala. 355. If money belonging to a debtor, which should be paid to his creditors, is used in the purchase of property for the benefit of another merely on a good consideration, the property purchased becomes the property of the debtor, as to his creditors.—*Pinkston v. McLemore*, 31 Ala. 308. A father, who procures a policy of insurance to be issued on his life payable to his child, and pays the premiums with his own money, makes a voluntary gift or assignment of a portion of his estate, which consti-

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tutes an investment for the benefit of the person in whose favor the policy is issued. There can be no difference in principle between a policy thus procured, and the assignment of a policy originally issued in his own name. On the death of the beneficiary, whether before or after the death of the assured, the fund arising therefrom will go by bequest or succession, as other personal assets of the beneficiary.—*Drake v. Stone, supra*. The insurance constitutes the property purchased, and is the subject-matter of the investment. If the father be in debt, such voluntary investment is fraudulent in law as to his existing creditors, without regard to his intent, or to his circumstances and condition as to ability to pay.—*Caldwell v. King*, 76 Ala. 149; *Anderson v. Anderson*, 64 Ala. 403. In such case, the donee will be regarded as a trustee of the investment for the benefit of the creditors of the donor.

The cases in some of the States, which limit the relief to the amount of premiums, are founded on local statutes. We have no statute prescribing the measure of recovery in cases like the present; but by the statute, which authorizes a married woman to procure insurance on the life of her husband, freed from the claims of his creditors, the amount of annual premiums which he may pay, is limited to five hundred dollars; and it is provided that if he exceeds the limits, the exemption shall apply to such insurance in the proportion of five hundred dollars to the amount of premiums paid, without declaring what disposition shall be made of the excess of insurance. Under this statute, it has been held, that if he exceeds the limits, the statute intervenes and devotes the excess of insurance to the payment of his debts, on the ground, that the statute fixes a limit, beyond which the husband can not pass in paying premiums from his own funds, which should be appropriated to his creditors. *Stone v. Knickerbocker Life Ins. Co.*, 52 Ala. 589. This judicial interpretation of the statute can be maintained only on the principle, that without the statutory intervention and exemption, the whole of the insurance would be subject to the payment of the debts of the husband. On settled principles, the conclusion follows, that if the subject of the gift or investment consists of a policy of insurance on the life of the debtor, the donee is liable for the money recovered on the policy. *Stokes v. Coffey*, 8 Bush. 533; *Elliott's Appeal*, 50 Penn. St. 75; *Bliss on Life Ins.* § 356.

It being shown, that the guardian of the beneficiary loaned to Donegan eight thousand dollars of the money recovered on the policy, complainant may follow it into his hands, and make available the mortgage given as security for its payment. Section 2908 of the Code, requiring suits to be revived within eighteen months after the death of a party, refers to actions at

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law, and does not apply to suits in chancery. Courts of equity in the matter of the revival of suits, are governed by their own rules of limitation. The limitation usually is the time required to bar the cause of action, but subject to the discretion of the court, and may be diminished, when necessary to subserve the purposes of justice.—*Ex parte Kirtland*, 49 Ala. 403. The failure to present the claim against Donegan's estate within eighteen months after the grant of letters of administration does not bar complainant's right to a foreclosure of the mortgage.—*Inge v. Boardman*, 2 Ala. 331; *Ware v. Curry*, 67 Ala. 274; *Barker v. Flinn*, 61 Ala. 530.

Affirmed.

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Statutory Real Action in Nature of Ejectment.

1. *Nonsuit; what is revisable.*—On appeal from a judgment of voluntary nonsuit (Code, § 3112), this court can only revise the rulings to which exceptions were duly reserved.

2. *Proviso to statute or section.*—The appropriate office of a proviso, generally, is to modify or restrain the enacting clause, or preceding matter only, unless a different intention is apparent; but, when the context and all the provisions relating to the same subject matter show an intent to give to the proviso a scope and effect beyond the section to which it is annexed, or the phrase immediately preceding it, it may be construed as restraining or qualifying preceding sections, or even as tantamount to an enactment in a separate section.

3. *Sale of lands for unpaid taxes; affidavit of collector as to want of personal property.*—Under the provisions of the act approved February 12th, 1879, relating to the sale of lands for delinquent taxes (Sess. Acts, 1878-9, pp. 3-8), the affidavit which the tax-collector is required (§ 12) to make and enter in the book filed by him in the office of the probate judge, as to his inability to find personal property after diligent search, is a jurisdictional fact, without which the court has no authority to make an order of sale.

4. *Amendment of complaint; claim of lien for taxes paid.*—When the purchaser of lands at a sale for unpaid taxes brings an action to recover the possession, and the sale is held invalid on any ground except that the taxes were not in fact due and unpaid, he may have judgment for the amount paid by him, with subsequent taxes, and statutory penalty, which constitutes a lien on the land (Sess. Acts, 1878-9, p. 8); and when it becomes apparent, from the rulings of the court during the trial, that this suit must fail, he has a right to amend his complaint by making the statutory statement and claim.

APPEAL from Limestone Circuit Court.

Tried before Hon. H. C. SPEAKE.

This was a statutory real action in the nature of ejectment,

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commenced on the 20th day of February, 1883, by Henry Wartensleben against Mary A. Haithecock to recover possession of a tract of land, particularly described in the complaint, together with damages for its detention. L. W. Humes, as landlord of the tenant in possession, was subsequently, upon his own motion, let in to defend, and issue was joined upon the plea of the general issue. The trial resulted in a verdict and judgment for the defendants; the plaintiff, in consequence of certain adverse rulings of the court excluding the "delinquent docket," &c., (the facts concerning which are stated in the opinion), taking a nonsuit, with a bill of exceptions. The proposed amendment of appellant's complaint, which was requested and refused in the primary court, was in the following language: "And the plaintiff avers that he claims in this suit under a tax-title, derived from a tax-sale, made May 17, 1880. R. A. McClellan, att'y for pl'ff."

McCLELLAN & McCLELLAN, for appellant.

HUMES, GORDON & SHEFFEY, and WM. R. FRANCIS, *contra*.

(No briefs came into the hands of the Reporter).

CLOPTON, J.—The title of the plaintiff to the lands in controversy is founded on a sale, under a proceeding before the judge of probate for the condemnation of the lands for the payment of delinquent taxes, as provided by the act of February 12th, 1879, entitled, "An act to provide for the sale of lands and other real estate for delinquent taxes and the redemption thereof."—Acts 1878–79, p. 3. The plaintiff having taken a voluntary *nonsuit*, we can only revise the decisions of the court, which made it necessary for the plaintiff to suffer a *nonsuit*. The only errors assigned, which we can consider relate to the exclusion of evidence, and the refusal of the court to allow the complaint to be amended.

The plaintiff offered in evidence a book, purporting to contain entries of each parcel of the lands, the name of the person against whom the taxes were assessed, the amount of the unpaid taxes and charges, and the decree of condemnation and sale. On March 1, 1880, the tax-collector made out and delivered to the judge of probate an imperfect docket on foolscap or legal-cap paper, showing the list of delinquent taxpayers for 1879, the real estate described as assessed to each, and the amount of unpaid taxes due from each delinquent, all or a portion of which tax was assessed on real estate. From this imperfect docket, which was not prepared in compliance with the statute, the judge of probate caused to be prepared

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the book offered in evidence. It was admitted, that no affidavit whatever was made and subscribed at the end of the book, and it is not shown that an affidavit such as is required by the twelfth section of the act, was made and subscribed and entered at the end of the docket made out and delivered by the tax-collector.

The jurisdiction conferred on the judge of probate in a proceeding to enforce the collection of taxes by a sale of lands, is statutory, special, and limited, and must affirmatively appear. *Driggers v. Cassady*, 71 Ala. 529; *Carlisle v. Watts*, 78 Ala. 486. A decree of sale, made in a proceeding, which does not show the existence of the facts on which the jurisdiction is based by the statute, is *coram non judice*, and is not evidence against the owner in a suit by a purchaser to recover the lands.

The statute imposes on the tax-collector the duty, "to procure a substantially bound book at the expense of the county, in which he shall enter in the manner usual for docketing causes for trial in the Circuit Courts, each parcel of all real estate assessed to any person or persons, against whom taxes have been assessed, which are not paid, when a portion or all of said taxes are on real estate, describing each parcel in the same manner it was assessed, and the amount of the unpaid taxes and charges due by such person or persons;" and to deliver such book into the office of the judge of probate. Unless the book is properly prepared, the judge of probate must cause it to be done at the expense of the collector. The docket thus prepared is the foundation, of the statutory notice to be issued by the judge of probate to the owner, his agent or representative, of each parcel of land entered therein, to show cause on a day named, why a decree should not be made for the sale of the land for the payment of the State and county taxes and costs; and of a decree of sale in the event he interposes no defense.

By the twelfth section, immediately succeeding the provision, that if under any sale had under its provisions any lands bid in by the State, the collector shall not be entitled to credit for the taxes on such lands, unless he files with the auditor an affidavit, that no personal property could be found by reasonable search, out of which to collect the taxes for which the lands were sold, it is enacted: "And provided further, That said collector shall, at the end of the book required by the first section of this act, enter, make, and subscribe the following oath, to be administered by the judge of probate, in whose office it is filed: '*I do solemnly swear I have in each case entered in this book, made diligent search for personal property of the party against whom the taxes are respectively assessed, and after diligent search, I was unable to find sufficient per-*

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sonal property, subject to taxation, from which to collect taxes or any part thereof.” Without alluding to the imperfect and improper manner, in disregard of the requirements of the statute, in which the docket was prepared by the collector, we shall confine the consideration to the inquiry, whether the inability of the collector to find sufficiency of personal property, by diligent search, from which to collect the taxes, to be shown by the statutory affidavit of the collector, is a jurisdictional fact?

It is insisted, the position, and connection of the proviso, and the context, show, that the affidavit is only a condition, on the performance of which the collector is entitled to a credit for the taxes on lands bid in by the State. A statute should be so construed as to give some effect and operation to each word and phrase, and all relating to the same subject-matter should be construed together. Though the proviso is found in a section, and immediately follows a particular phrase, its effect is not necessarily limited and restricted to the same section. Generally, the appropriate office of a proviso is to restrain or modify the enacting clause, or preceding matter, and should be confined to what precedes, unless the intention, that it shall apply to some other matter, is apparent. When from the context, and a comparison of all the provisions relating to the same subject-matter, it is manifest, that the object and intent were to give the proviso a scope extending beyond the section, and effect beyond the phrase immediately preceding, it will be construed as restraining or qualifying preceding sections relating to the subject-matter of the proviso, or as tantamount to an enactment in a separate section, without regard to its position and connection.—*Mayor of Cumberland v. McGender*, 34 Md. 381; *United States v. Babbit*, 1 Black, 55.

The limitation of the operation of the proviso to the phrase in the same section, leaves it without any practical or serving purpose and effect. The docket, in which the affidavit is required to be entered, remains in the office of the judge of probate, and is not conveniently accessible to the Auditor. The Legislature specially provided, that an affidavit should be filed with the Auditor, and deemed this sufficient in respect to allowing credit for the taxes on land sold and bid in by the State. The Auditor is authorized to act and allow the credit upon the affidavit alone, which the collector is required to file with him. As the oath to be entered at the end of the book is superfluous and useless for this purpose, some other effect should be given to the proviso. A construction should be avoided, which imposes on the collector the burden of needless and superfluous proof before he is entitled to a credit for the taxes—of making two affidavits of the same tenor and substance for the same pur-

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pose. The only other field of operation is in reference to proceedings for the sale of the land. The oath required to be entered at the end of the docket is the one on which the judge of probate acts; the affidavit required to be filed with the auditor is the evidence on which he acts.

Under the revenue law, personal property is the primary fund to which resort must be made for the compulsory payment of taxes. There is no power or right to sell land, only in the event personal property can not be found after reasonable search. *Stoudenmire v. Brown*, 57 Ala. 481; *Davis v. Minge*, 56 Ala. 121. Proof that the tax-payer has, in the county, sufficient personal property, which could have been found by reasonable search, from which his unpaid taxes could have been collected, constitutes a valid defense to the judicial proceedings for the sale of lands for the payment of taxes.—*Diggers v. Cassady*, *supra*. The proceeding is *in rem*, and has regard to the land itself, though it also partakes of the nature of a proceeding *in personam*, upon notice to the owner and his appearance to contest. The jurisdiction of the judge of probate arises, and he takes up the case, after the inability of the collector to collect the taxes from personal property. The docket, prepared and delivered by the collector is, for all legal purposes, a return or report of the jurisdictional facts to the judge of probate.

It may be, that ordinarily, judicial proceedings will not be regarded as void for the absence of a *verifying* affidavit, though the statute may require such affidavit, the jurisdiction of the court, in such case, being founded on the *allegation* of the jurisdictional facts, and not upon their *verification*. The tax-collector is not required to verify the general entries in the book. The requisite affidavit relates to a separate, independent, and distinct fact, which did not and could not appear on the assessment roll, or elsewhere. Because of the importance of this fact, and its necessity to the power and right of the judge of probate to decree a sale of the lands, the legislature deemed proper to require, that its return or report should be made in the form, and under the solemnity of an oath, to be entered at the end of the book, and to constitute a part thereof. The docket, substantially prepared as required by the act, was designed to comprise the return or report of the collector to the judge of probate of *all* the facts, on which lands may be subjected to the payment of taxes. No officer, other than the judge of probate in whose office the docket is filed, is authorized to administer the oath. He should not receive the docket unless the required oath be made, and entered therein. The first and second sections of the act, and the oath prescribed by the proviso in the twelfth section, relate to the same subject-matter—the docket and the manner of its preparation and its

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contents. The entries in the book of each parcel of real estate assessed, the person against whom the taxes are assessed, a portion of which are on real estate, and the amount of taxes and charges due and unpaid, though necessary, are not by themselves sufficient to subject the lands. The inability to find personal property from which to collect the taxes is a fact, essential to the power of the court to condemn and decree a sale. The act requires this fact to be entered in the docket, and the effect is to make it a jurisdictional fact, which should appear in the proceedings. It constitutes a part of the docket, as essential as the other entries to the power of the court to decree a sale; and being thus requisite, the same reasons exist for regarding it a jurisdictional fact, as such other entries. A docket, containing all the entries required by the statute, is necessary to the jurisdiction of the judge of probate. It is no answer that the owner may show in defense, the possession and ownership of personal property. The allegations, contained in the docket, should make a *prima facie* case, which the answer is required to overcome. The purpose was, that the docket returned by the collector should show the existence of all the facts, on which the judge of probate would be authorized to decree a sale of lands for the payment of taxes in the event the owner did not appear to contest. The analogous rules are those which apply in applications for the sale of lands of a decedent for the payment of debts.—*Thatcher v. Powell*, 6 Whea. 119.

The book having been properly excluded, the evidence subsequently offered is, of consequence, irrelevant and inadmissible.

But the court erred in not allowing the amendment to the complaint. The statute provides, that if, in any suit by the purchaser against the owner to recover possession of land sold for taxes, final judgment be rendered, that the plaintiff is not entitled to recover possession on the ground of invalidity in the sale, except that the taxes were not due, the court shall forthwith empanel a jury to ascertain the amount of taxes for which the land was liable at the time of the sale, and for which it was sold, and of such taxes thereon as may have been lawfully paid by plaintiff subsequently, with interest at the rate of twenty-five per cent. per annum, from the time of the sale or subsequent payment as the case may be, and thereupon the court shall render judgment against the defendant for the amount thus ascertained, which shall constitute a lien on the land; and that a statement in, or appended to the complaint, that the plaintiff claims under the tax sale, stating the time of the sale, shall be sufficient pleading to authorize the court to institute inquiry and render judgment as provided.—Acts 1878–79, p. 8. When it was discovered from the rulings of the court, that final

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judgment must necessarily be rendered that the plaintiff was not entitled to recover possession on the ground that the probate judge had no jurisdiction to decree a sale, he had the right to amend the complaint by incorporating therein, or appending thereto, the statutory statement, in order that on the rendition of the judgment the court should institute the inquiry, and render judgment for the amount ascertained to be due as authorized by the statute. The purpose of the statute is to authorize the purchaser, in the event his title is valid for any reason other than the taxes were not due, to recover the taxes for which the land was liable and sold, and also which had been subsequently paid by him—to compel the owner to pay the taxes lawfully due—and to authorize the determination in *one* suit, of the right of the purchaser to recover possession, and failing in this, to recover the amount of taxes lawfully due by the owner and the statutory penalty. By the refusal of the court to allow the amendment, the latter inquiry was prevented.

Reversed and remanded.

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Action on Insurance Policy for Loss by Fire.

1. *Representation as to interest of insured in property.*—The erection of a party wall, by agreement between the insured and the vendee of the adjoining premises, running up two stories high on the wall of the insured property, does not show that the interest of the insured in his property is "other than the entire, unconditional, and sole ownership," as stated in answer to questions; especially when the agent of the insurer, through whom the policy was effected, lived in the town where the property was situated, and must have known its condition.

2. *Agency in procuring policy.*—An agent of the insurance company, through whom a policy is effected, can not be considered in any sense as the agent of the insured, in any matter connected with the issuing of the policy.

3. *Waiver of proof of loss and notice.*—When the insurance company, on being notified of a loss, at once offers to pay a specific sum, denying liability for some of the articles as not being covered by the policy, this is a waiver of the preliminary proof of loss, and authorizes the insured to sue at once, without waiting for the lapse of sixty days provided for in the policy.

4. *Construction of policy as to fixtures included or excepted.*—A policy insuring a brick store against fire, containing an exception of "fences and other yard fixtures, side-walks, store furniture and fixtures," covers a wooden shed or awning in front of the building, supported on pillars sunk in the ground, with rafters extending into the brick wall; but the shelving in the house, and an office enclosed with railing in

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one corner of the interior, are "store fixtures" within the meaning of the exception.

5. *Same; clause providing for repairs.*—When the policy contains a clause giving the insured the option to repair within a reasonable time, and he claims the benefit of it, this is not a full defense to an action on the policy, unless by the repairs the property is made as serviceable and valuable as before the fire.

6. *Same; measure of damages.*—When the policy provides that the cash value of the property destroyed or damaged shall not exceed what would be the cost to the assured of replacing it, and, in case of depreciation from use or otherwise, a suitable deduction shall be made from the cost of repairing; the measure of damages would be the cost of repairs, if thereby the property is rendered as valuable as it was before; if less valuable than before, then the difference must be added to the cost; and if more valuable, it must be deducted.

7. *Tender.*—A tender of less than the amount claimed, conditioned on a receipt in full being signed, and not accompanied by the payment of the money into court (Code, § 2997), is not good.

8. *Argument of counsel; objectionable language.*—In his argument to the jury, counsel has no right to refer to or comment on facts, or assumed facts, as to which there is no evidence before the jury; as by referring to the character of plaintiff's ancestors, or characterizing the defendants as a soulless corporation; and the use of such language being duly objected and excepted to, is a reversible error.

APPEAL from Limestone Circuit Court.

Tried before the Hon. H. C. SPEAKE.

This action was brought by Benj. L. Allen, Maria Allen, and James W. Allen against the Commercial Fire Insurance Company, of Montgomery, Ala., to recover the damages alleged to have been sustained by the plaintiffs by fire upon a brick store house in the town of Athens, and against which said damage they claimed to be insured by the defendant. The contention was as to the scope of the stipulations in the policy issued by the defendant—whether it covered an awning in front of the building and the shelving therein—which were damaged by fire. The defendant pleaded: 1. Non assumpsit. 2. That the suit was prematurely brought and before any right of action had accrued to plaintiffs upon the policy sued on. 3. That suit was brought before preliminary proof of loss, as stipulated in the policy. 4. That suit was brought before notice of loss was given to defendant, as required by the policy. 5. Tender. 6. Limitation of one year provided by the policy. 7. Breach of warranty. 8. Misrepresentation. Upon motion of plaintiffs the 2d, 3d, and 4th pleas were stricken from the file on the ground, that they were united with pleas in bar. Issue was taken on the remaining pleas, resulting in a verdict for the plaintiffs for \$327.37½. On the trial of the cause, the plaintiffs introduced in evidence the policy issued by the defendant, (the clauses therein, upon which contention arose, being set out in the opinion of the court), oral testimony in regard to the fact and circumstances of the fire, and the character

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and position of the awning, &c. To show a waiver by the defendant of proof of loss by injury to the awning and shelving of assured's store, evidence was offered of a telegram from defendant, and conversations with defendant's agent, denying all liability of defendant for said loss. The defendant offered in evidence the original summons and complaint to show when the suit was brought, the application for insurance, with the questions therein answered by the assured, and evidence of the estimated damage to the insured building. The defendant objected, and the court declined to interfere, and permitted plaintiffs' counsel in his concluding argument to say to the jury, "that the ancestry (naming them) of plaintiffs were well known to counsel, and to every one else who had lived in the community with them; that their honor, integrity, honesty and truthfulness, and that of their descendants, had never been called in question until this soulless corporation, defendant in this case, had charged one of their descendants, Ben. Lee Allen, with falsehood, fraud and misrepresentation in procuring the policy of insurance in this case." A great number of charges were asked, but as the material rulings are noticed in the opinion of the court it is considered unnecessary to review them. There were sixty-four assignments of error, which the elaborate review of the whole case by this court renders it unnecessary to enumerate.

HUMES, GORDON & SHEFFEY, for appellants.—1. The court erred in striking out pleas two, three and four, (that suit was prematurely brought) upon plaintiffs' motion, based on the theory that such defense could only be presented by *plea in abatement*. There was no necessity for pleading in abatement; such defense may be made under the *general issue*.—*Rainey v. Long*, 9 Ala. 754; see also, *Facquire v. Rynaston*, 2 *Ld. Raymond*, 1249; 2 *Gray*, 288; 125 *Mass.* 365; 3 *Wendell*, 170–172; 6 *W. & S.* 179; *Lowe v. Wastman*, (s. c., N. J. Nov. 1885), 21 *Reporter*, 53. 2. By an express stipulation in the policy of insurance, *fixtures* were excluded, and required to be specially and separately insured. Evidence of damage to awning and shelving was erroneously admitted by the court.—*Thurston v. Ins. Co* (U. S. Circuit Ct. Dist. N. Hampshire), 17 *Feb. Reporter*, 127; s. c., 16 *Reporter*, 161; s. c., Albany L. J., Dec. 22, 1883; *Fore v. Hibbard*, 63 *Ala.* 410. 3. The policy of insurance expressly provides that the application of the assured shall constitute a part of the contract and a warranty by the assured; and if there be any false representation or misrepresentation in said application, or *if the interest of the assured in the property be not truly stated*, then the policy to be void. The assured represented in their

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application that they owned the property in *fee simple*; the proof showed that Mason had purchased the right to use the west wall of the building insured, and also the right to build on top of said building. This was a breach of the warranty of assured's statement that the property was owned *in fee*, and the charge asked by the defendant on that point should have been given.—May on Insurance, §§ 158, 185. See also *Emm. Mut. Ins. Co. v. Jessr.* 1 Met. (Ky.) 523; *Ag. Ins. Co. v. Montague*, 38 Mich. 548; *Etna Ins. Co. v. Resh*, 40 Mich. 241; *Davenport v. Ins. Co.*, 6 Cush. 340; *Wilbur v. Ins. Co.*, 10 Cush. 446; *Falls v. Ins. Co.*, 7 Allen, 46; *Abbott v. Ins. Co.*, 3 Allen, 213; *Jenkins v. Ins. Co.*, 7 Gray, 370; *Washington Fire Ins. Co.*, 32 Md.; *Wineland v. Ins. Co.*, 53 Md. 276; (s. c., 9 Reporter, 784); *Graham v. Firemen's Ins. Co.*, 87 N. Y. 69; (s. c., 13 Rep. 314); *Savage v. Fire Ins. Co.*, 52 N. Y. 502; *Adema v. LaFayette Ins. Co.*, — La.; s. c., 19 Rep. 493). 4. As to the award. It was expressly agreed by Allen that whatever estimate of damage should be reached by Myers after his inspection of the premises with McKissack, he would be bound by. So that the conclusion reached by Myers was final and conclusive on Allen as a valid award. The court erred in refusing appellant's charges on this point.—*Yeatman v. Mattison*, 59 Ala. 382; *Brewer v. Bain*, 60 Ala. 153; *Burns v. Hendrix*, 54 Ala. 78; *Byrd v. Odom*, 9 Ala. 755. 5. The court erred in refusing to sustain the objection of defendants to the objectionable remarks of counsel of plaintiffs.—*Wolffe v. Minnis*, 74 Ala. 386; *E. Tenn., &c., R. R'd v. Bayliss*, 75 Ala. 466; *E. Tenn., &c., R. R'd v. Carlos*, 77 Ala. 443. 6. The court erred in its rulings on the measure of damages.—*Vance v. Foster*, 1 Inst. Circuit Ct., 51; May on Ins. (2d Ed.) 659; *Ib.* 646.

ROBT. A. McCLELLAN, *contra*.—1. The defendant waived the preliminary proof of loss.—May on Ins. 572–574; 33 Ala. 9; *Flanders on Ins.* 541–7; 71 Ala. 516–527–8. 2. The defendant waived the sixty days allowed for the adjustment of the debt.—*Flanders*, 532, 542; May on Ins. 574–5; 13 U. S. Dig. 503. 3. The alleged arbitration was not binding. Besides, it was abandoned.—*Flanders*, 576. May on Ins. 573, 598, 492–4. 4. “The store-house” included the office, shelves, and awning, they being part of and appurtenant to the main structure.—*Flanders*, 72–4; May on Ins. 519, 420; 4 Wait's Ac. & Def. 69–70; 47 Ala. 387. They were put up with the house and were indispensable to a store, and passed from vendor to vendee. In case of doubt, the construction will be against the insurance company.—May on Ins. 181–3. 5. The *printed* clause in the policy is in conflict with the written parts

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of the same; when this is the case, the latter will prevail. Flanders, 70-72; May on Ins. 184-5; Wait's Ac. & Def. 21. The *written* description of the premises included these fixtures. The store-house would be incomplete without these fixtures. 6. Mason's interest was but an easement, and did not affect the character of plaintiffs' title. At any rate, the cases making an immaterial answer a warranty have been overruled.—16 Wend. 385; 9 How. 390; 26 Ill. 360. 7. As to measure of damages, see May on Ins., §§ 323-4.

STONE, C. J.—The present action is founded on a policy, insuring real property against destruction or damage by fire. The property is described in the policy as follows: "Brick one-story, iron-roofed building, * * occupied by S. Tanner & Son, family groceries, and after January 1, 1882, to be occupied by Henry Warten, and used as a family grocery store." The policy bears date December 17, 1881, and insures the property for one year. On the 4th February, 1882, the house was partially injured by the burning of a store contiguous to it, and on the 24th of the same month the present action was instituted. The insurer and the insured were not of one mind as to the extent of the property covered by the insurance. Out of this grew the contention and this lawsuit. Attached to the building at the front was an awning or shed, erected on posts set in the ground, with rafters extending to and into the brick wall, and covered with plank. This awning was constructed by the owners of the building, not contemporaneously with it, but a year later. There were in the building, and attached to it by fastenings, shelving, drawers, and an office at the rear end, fenced off by panel work. All these, such as are customary in a store house, were placed there by the owners, and let with the building. The insured claimed for the damage done to the awning, the shelving, and the office. The Insurance Company resisted this claim, and contended it was liable only for the damage done to the house itself.

Certain questions had been asked of the applicant for insurance, Allen, and answers given, before the policy was issued; and there is a clause in the policy in the following language: "Special reference is had to assured's application on file in this office, which is their warranty and a part hereof." In the application are the following question and answer: "Is the land on which building stands held in fee simple or on lease?" Answer, "Fee simple." The third clause of the policy stipulates that "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and

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benefit of the assured, or if the building insured stands on leased ground, it must be represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void." After the building in controversy was erected, the plaintiffs sold the soil contiguous to it on the west to one Mason, and stipulated that in building on the lot so purchased, Mason should make the west wall of the plaintiff's house the east wall of his, inserting his joists into the wall; and Mason's house being a two-story building, it was further stipulated that he should raise the east wall of his building on the said west wall of plaintiffs. This was done, and the property stood in that condition and in that right when the policy was taken out in this case, and when the fire occurred. This, it is contended for appellant, was a misdescription of plaintiffs' title and ownership and avoids the policy.

We do not think this objection well taken. We concur in opinion with the trial court, and hold that the essential purpose of the inquiry was, to learn whether the property was held by a title in fee, or by a title less valuable than a fee; and, whether the property was incumbered by alien interests, liens, or other incumbrances, which lessened the value of the applicant's insurable interest. The easement or servitude previously conveyed or granted to Mason was but carrying into effect the usual method of building in cities and towns by co-terminous proprietors. It is shown that Ainsworth, appellant's agent at the time the policy was applied for and issued, resided in the town of Athens, where the property is situated. With him the assured negotiated, and effected the insurance. He was familiar with the premises, and must have known in what manner the houses were connected together, and that the east wall of Mason's upper story rested on the west wall of the house he was insuring. He was the agent of the insurance company, and we have no sympathy with any attempt to transform him into an agent of the applicants, in any service connected with the issue of the policy. With him alone the assured had dealings; and it would be an anomaly if we were to hold he was their agent, and not the agent of the Insurance Company with which they were negotiating. If he did not represent the corporation, it had no representative, and yet agreed to the terms on a solemn contract. Such shifting use of a paid employee, finds no sanction in that sturdy morality which should underlie every system of jurisprudence.—*Piedmont & Arlington Ins. Co. v. Young*, 58 Ala. 476; *Ins. Co. v. Wilkinson*, 13 Wall. 222; *De Laney v. Ins. Co.*, 52 N. H. 581; *May on Insurance*, § 143; *Rowley v. Empire Ins. Co.*, 36 N. Y. 350. A few cases are variant from this principle.

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Wineland v. Security Ins. Co., 53 Md. 276; *Jenkins v. Quincy Mutual Fire Insurance Co.*, 7 Gray, 370. We do not think Allen's failure to disclose the fact and nature of Mason's right or easement impaired or affected the substantial truthfulness of the representation as to title.—*Aetna Ins. Co. v. Tyler*, 16 Wend. 385; *Savage v. Howard Ins. Co.*, 52 N. Y. 502; *Washington Fire Ins. Co. v. Kelly*, 32 Md. 421; *Couch v. Rochester Fire Ins. Co.*, 25 Hun. 469; *Castner v. Farmers' Mut. Fire Ins. Co.*, 46 Mich. 15; *Amer. Cen. Ins. Co. v. McCrea*, 41 Amer. Rep. 647; *Hadley v. Ins. Co.* 55 N. H. 110. We do not question the correctness of the following authorities, nor do we consider they conflict with the views expressed above. In each of them the misdescription was substantial, and materially impaired the nature of the title. *Em. Mut. Ins. Con. v. Jesse*, 1 Met. (Ky.) 523; *Agricultural Ins. Co. v. Montauge*, 38 Mich. 548; *Aetna Ins. Co. v. Resh*, 40 Mich. 241; *Davenport v. N. E. Mut. Fire Ins. Co.* 6 Cush. 340; *Wilber v. Bowditch Mut. Fire Ins. Co.*, 10 Cush. 446; *Abbott v. Shawmut Mut. Fire Ins. Co.*, 3 Allen, 213; *Falls v. Conway Fire Ins. Co.*, 7 Allen, 46; *Graham v. Fireman's Ins. Co.*, 87 N. Y. 69; *Columbia Ins. Co. v. Lawrence*, 2 Pet. 25; *Same v. Same*, 10 Pet. 507; *Jeffries v. Life Ins. Co.*, 22 Wall. 47; *Aetna Life Ins. Co. v. France*, 91 U. S. 510; *Sun. Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485.

We think on the uncontroverted facts shown in this record the Insurance Company waived the production of the preliminary proofs.—*May on Insurance*, § 469; *Flanders on Insurance*, 541; *Taylor v. Mer. Fire Ins. Co.*, 9 How. U. S. 390; *Norwich & N. Y. Trans. Co. v. Western Mass. Ins. Co.*, 34 Conn. 561; *Williamsburg City Fire Ins. Co. v. Cary*, 83 Ill. 453; *Ins. Co. v. Corsby*, 60 Miss. 302.

So, we think the delay of sixty days after proof furnished before right of action accrues, was also waived in this case. The Insurance Company denied all liability to pay, except for damage done to the house proper, and offered to pay a specified sum in satisfaction of that admitted liability. This relieved the plaintiffs of the necessity of waiting sixty days before bringing suit.—*Flanders on Insurance*, 532; *Phillips v. Protection Ins. Co.* 14 Mo. 220; *Norwich & N. Y. Trans. Co. v. Western Mass. Ins. Co.* 34 Conn. 561; *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 366.

On the two questions last presented the testimony was full and undisputed, and could have been charged upon without hypothesis.—*Carter v. Chambers*; (In MS.) Present Term. The Circuit Court, in ruling on those questions, did not and could not err to the prejudice of appellant.

The policy sued on contains this clause: "Fences and other

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yard fixtures, sidewalks, store furniture and fixtures are not covered by insurance on the building, but must be separately and specifically insured." Under this clause it is contended for the Insurance Company that the risk does not cover the awning, the shelving, nor the office. We think it unquestionably clear that under the testimony in this record each of these items must be classed as a fixture.—*Thurston v. Union Ins. Co.*, Albany Law Journal, Vol 28, No. 25, December 22, 1883 ; May on Insurance, § 420 ; 3 Wait Ac. & Def. 376 *et seq.* ; *Fore v. Hibbard*, 63 Ala. 410. But the exception does not include all fixtures. It is only "store fixtures" and "yard fixtures," that come within the exception. The awning was not a yard fixture. It was attached to the front of the house, we must suppose for purposes of shade. There was no yard there to which it could be attached or affixed. It was a fixture to the house *as a house*, and in no sense a store fixture—that is, a fixture attached to the store, tributary to its use, as a store. The shelving and office were store fixtures, and were not insured. The awning was a fixture, but a part of the building, and would have passed by a conveyance of the property as a house, and would have descended to the heirs by inheritance. But, as we have said, it was not a "store fixture," and was not excepted from the binding obligation of the insurance policy. Its removal, or demolition would seem to have been justified by the attending circumstances, and if so, the Insurance Company must make good the damage.—4 Wait. Ac. & Def. 67 ; May on Insurance, § 404.

A question was raised on the rule or measure of recovery. The policy provides that "it shall be optional with the company to repair, rebuild, or replace any property lost or damaged, with other of like kind and quality, within a reasonable time, giving notice of the intention so to do within sixty days after receipt of proofs herein required." The Insurance Company expressed no wish or intention to repair the damage in this case, and hence we need not consider this clause, further than to say, if the right to repair be claimed, it will not be a full defense and compensation, unless by the repairs the property is made as serviceable and valuable as it was before the burning. The policy, however, contains the further clause, that "the cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured at the time of the fire of replacing the same ; and in case of the depreciation of such property from use or otherwise, a suitable deduction from the cash cost of repairing the same shall be made, to ascertain the actual cash value." It would seem there should be no difficulty in interpreting this clause. If by repairs the property can be rendered as valuable as it was before the fire, then the cost of

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repairs is the measure of recovery. If property had been destroyed which, from use or otherwise, had become less valuable than when new, then the cost of repairing it, less the percentage of depreciation of the destroyed article by such use, will determine the extent of the damages. If the property, after being repaired, is not as valuable as it was before the fire, then the cost of repairs, supplemented with the amount of depreciation in value, are the factors for fixing the damages. There was no error in admitting testimony as to damage to the property covered by the policy.

The record affirms it contains all the evidence. It is shown that when the one hundred dollars was tendered, the execution of one or two receipts, each expressing to be in full of certain claims of insurance, was made a condition of its payment. There is no proof that the money was brought into court. Either of these objections was fatal to the defense attempted under the plea of tender.—2 Pars. on Contr. *644-5; Code of 1876, § 4698; *Daughdrill v. Sweeny*, 41 Ala. 310; *Alexander v. Caldwell*, 61 Ala. 543.

The remarks of counsel in the concluding argument were objectionable, and the court erred in not arresting that line of argument, when thereto requested.—*Wolffe v. Minnis*, 74 Ala. 386; *Cross v. The State*, 68 Ala. 476; *E. T. Va. & Ga. R. R. Co. v. Bayliss*, 75 Ala. 466; *Same v. Carloss*, 77 Ala. 443.

We consider it unnecessary to comment on what is claimed as an award. Negotiations were conducted afterwards, and it was not insisted on as settling the controversy.

We have now noticed every material error which was raised in the court below. We will not attempt to apply the principles to the numerous exceptions and many assignments of error.

Reversed and remanded.

CLOPTON, J., not sitting.

Town of Greensboro v. Ehrenreich.

Prosecution for Violation of Town Ordinance.

1. *Validity of municipal ordinance prohibiting importation or sale of second-hand clothing, bedding, &c.*—Power conferred on a municipal corporation, by its charter, “to pass and enforce all ordinances deemed necessary or proper to prevent the introduction of infectious or contagious diseases, and to preserve the health of the inhabitants,” does not confer authority to enact an ordinance making it unlawful for any per-

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son "to import, sell, or otherwise deal in second-hand or cast-off garments, blankets, bedding or bed-cloths," with a proviso excepting the sale of such articles when not imported, or which have not been used by persons having infectious diseases.

APPEAL from Hale Circuit Court.

Tried before the Hon. S. H. SPROTT.

The appellee was arrested and convicted by the mayor, for a violation of an ordinance of the town of Greensboro, entitled "an ordinance to regulate the sale of imported second-hand or cast-off clothing and other goods," which provides that "it shall be unlawful for any person to import, sell or otherwise deal in second-hand or cast-off garments, blankets, bedding or bed-clothing in said town of Greensboro; provided that this ordinance shall not apply to the sale of said articles not imported, and that have not been used by persons having infectious diseases," with a penalty of not less than ten dollars for its violation. From the mayor's judgment an appeal was taken to the Circuit Court where a demurrer was interposed to the proceedings or statement filed, setting up the unconstitutionality of said ordinance, and that it was unreasonable and against common right. The demurrer was sustained and the accused discharged. The town of Greensboro takes this appeal from the judgment of the Circuit Court.

COLEMAN & COLEMAN, for appellant.—1. The power to direct and regulate the mode of selling by citizens, and within its own territory, is one of the acknowledged powers of State government, and has never been doubted.—*Commonwealth v. Kimball*, 35 Amer. Dec. 326; *City of New York v. Miles*, 11 Peters 133; *Gibbons v. Ogden*, 9 Wheaton 194. 2. Quarantine and health laws are considered as emanating from an acknowledged power of the State to preserve and provide for the health of its citizens.—*Cooley's Con. Lim.* (4th Ed.) 729–732; *Commonwealth v. Kimball*, 35 Ame. Dec. 326; *Gibbons v. Ogden*, 9 Wheaton 194. 3. An ordinance passed by a municipality for the protection and preservation of the public health, though prohibitory, is in the nature of a general regulation, and is not to be construed with technical strictness, and every reasonable presumption is to be made in its favor.—*Taunton v. Taylor*, 116 Mass. 260; *Commonwealth v. Patch*, 97 Mass. 221; *Woodruff v. Stewart*, 63 Ala. 215; Sedgwick on Con. of Stat. and Con. Law. 194. 4. This ordinance is of the nature, and is in fact a police regulation, passed in exercise of the police power delegated to the town of Greensboro by the legislature.—*Inhabitants of Watertown v. Mayo*, 12 Amer. Rep. 696; *Slaughter House Cases*, 16 Wallace, 36–63. In the exercise of this police power a municipality may interfere not

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only to regulate the sale of a commodity, but may even prohibit its sale, or condemn and destroy it.—35 Am. Dec. *supra*; 107 Mass. 396; 5 Otto. 471-2; 34 N. Y. 657; 92 Ill. 569; 69 Ill. 595.

THOS. R. ROULHAC, *contra*.—Cited: Acts 1878-9, p. 388; *Fisher v. Blight*, 2 Craven 358, 399; *Purdy v. Peeples*, 4 Hill 397; *McClusky v. Cromwell*, 11 N. Y. 601-4; *Walter v. Harris*, 20 Wend. 561-2; *King v. Carrtwright*, 4 T. R. 490; *U. S. v. Palmer*, 3 Wheat. 610; Potter's Dwarries 194; Sedgwick on Stat. & Con. Law. p. 50; 9 Cranch 104; 5 Cranch 368; Dillon on Mun. Cor. §§ 954-5; 16 How. 369-380; *Sloan v. The State*, 8 Blackford (Ind.) 361; *People v. Morris*, 13 Wend. 325; 12 Wall. 418; 100 U. S. 434; Cooley Con. Lim. § 16; 7 How. 283; 71 Ala. 504; 102 U. S. 123; 8 Wall. 123; 73 Ala. 480; 70 Ala. 361; 92 U. S. 268.

CLOPTON, J.—The charter of the town of Greensboro confers authority: "To pass and enforce all ordinances deemed necessary or proper to prevent the introduction of infectious diseases, and to preserve the health of the inhabitants of the same." Under this power, the corporate authorities passed an ordinance declaring: "That it shall be unlawful for any person to import, sell, or otherwise deal in cast-off garments, blankets, bedding, or bed-clothes in said town of Greensboro; Provided, that this ordinance shall not apply to the sale of said articles not imported, and that have not been used by persons having infectious diseases;" and prescribing a penalty for its violation. The validity of the ordinance is the question for determination.

The legislature has undoubted power to authorize, and the authority conferred is ample, to pass ordinances on the enumerated subjects—the prevention of the introduction of infectious or contagious diseases, and the preservation of the public health. Ordinances, having for their object the protection of the health of the inhabitants, which is one of the principal purposes and most important duties of municipal governments, are generally regarded as police regulations, subject to which the individual holds his rights of liberty and of property. Presumptions will be indulged in favor of their necessity, propriety, and validity, and when not unreasonable, nor partial, nor oppressive, nor inconsistent with the legislative policy of the State, should and will be sustained. Considered a part of a system of police regulations in aid of the preservation of the public health, the courts will not interfere with, or set them aside, unless the power has been manifestly transcended. By the grant of power, the character and special provisions of the

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ordinances are largely left to the discretion and judgment of the corporate authorities—"deemed necessary or proper,"—not, however, an absolute power to pass any ordinances, which they may perchance judge necessary or proper; not to be exercised capriciously, but with regard to the circumstances, the object to be accomplished, and the existing necessity. Notwithstanding the grant of power is general—"to pass and enforce ordinances deemed necessary and proper"—ordinances passed under the power must not be unreasonable, partial, or unfair; must not be in restraint of trade; nor contravene the general laws and public policy. It will not be presumed, that the legislature intended to clothe the municipal government with power to dispense with the requisites to a valid ordinance. The power will not be enlarged by intendment. And though the necessity and propriety of a particular ordinance is primarily of legislative determination, its character, whether reasonable, impartial, and consistent with the State policy, are questions for the court.—1 Dil. on Mun. Cor., §§ 319, 325, 329; *Int. & Coun. of Marion v. Chandler*, 6 Ala. 899; *Ex parte Frank*, 52 Cal. 606.

The general statutes provide quarantine as the means to prevent the introduction of infectious or contagious diseases. To this end, any town or city may establish a quarantine ground; the corporate authorities may, from time to time, prescribe the quarantine to be observed by all vessels arriving within the harbor or vicinity; may extend such regulations to all persons, goods, and effects in such vessels; and may compel any person coming into town, by land, from a place infected with a contagious disease, to perform quarantine, and be restrained from travelling until discharged.—Code of 1876, §§ 1507–1512. The policy of the statutory provisions is the regulation of trade and travel by temporary restraint, not extending beyond the occasion and scope of the necessity—self-defensive, which is the limitation on the police power of the State imposed by the Federal Constitution.—*Railroad Co. v. Husen*, 95 U. S. 465. The State can not confer upon the subordinate agencies of the government powers which it does not possess, and can not exercise. The general grant in the act of incorporation, it will be presumed, had reference to these and kindred regulations. We do not mean, that the corporate authorities may not adopt and provide other and additional regulations; but that they should be in accordance with the spirit and policy of the general statutes.

The professed object of the ordinance, as shown by the preamble reciting the recommendation of the officers and members of the board of health, is to protect the health of the community. While unquestionably the municipal govern-

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ment may pass sanitary ordinances for the preservation of health within its limits; may prevent articles of merchandise or other things which have been used by persons or in places infected with contagious disease, from being brought into the town; may establish quarantine and reasonable inspection regulations; and provide for disinfecting or destroying the germs of disease as far as practicable; and it may be, for obtaining satisfactory assurance that such articles have not been exposed to an infectious or contagious disease; the power can not be carried beyond what is necessary for protection. It will not be controverted, that second-hand or cast-off garments, blankets, bedding, and bed-clothes are not, *per se*, introductive of infectious or contagious diseases; and that a lawful business selling or dealing in them, may be carried on without danger to the public health. They become dangerous by reason of the nature of previous use, condition, or exposure. This is virtually admitted by the *proviso* to the ordinance, which excepts from its operation the sale of the specified articles not imported, and that have not been used by a person having an infectious disease. The operation of the ordinance reaches beyond the scope of necessary protection and prevention into the domain of restraint of lawful trade, by permanently prohibiting the importation, selling, or otherwise dealing in the enumerated articles, though they may not have been used by persons or in districts, infected with such diseases. Municipal authorities, having power to abate nuisances, can not absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They can not, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. If they can declare it unlawful to import, sell or otherwise deal in second-hand or cast-off garments, blankets, bedding, and bed-clothes, without regard to the circumstances or necessity, they may, under the same power, declare it unlawful to import or sell meat because at some times and in some places, it is infected with trichina, or other kind of food, because liable to adulteration. That the ordinance is founded on the fear and apprehension of possible danger, and not on its existence, is shown by the unequal discrimination between articles imported and not imported. We can not regard it a legitimate exercise of the power conferred by the act of incorporation.—*Weil v. Record*, 24 N. J. Eq. 169; *Barling v. West*, 29 Wis. 307; *Dnnham v. Rochester*, 5 Cow. 462; *Mayor, &c., of Mobile v. Yuille*, 3 Ala. 137.

Affirmed.

[Clark, Adm'r, v. Eubank et als.]

Clark, Adm'r, v. Eubank et als.*Final Settlement by Administrator of Insolvent Estate.*

1. *Liability of administrator for rents and hires during late war, 1861-65.*—On final settlement of the accounts of a deceased administrator, who kept the estate together during the late war (1861-65) without an order of court, the distributees electing to charge him with rents of the lands and the hire of the slaves, while the court will enforce the cardinal rule, which requires administrators to act in good faith, and to exercise that degree of skill and diligence which a prudent man uses in the management of his private affairs of similar nature, it will deal leniently where good faith is shown, having due regard to the disturbed condition of the country, and the difficulties and embarrassments resulting therefrom to the management and preservation of estates; and will neither compel a strict and exact accounting, nor, when the estimates of the several witnesses differ, adopt the highest value of the rents and hires as the measure of liability.

2. *Allowance of attorney's fees to administrator.*—An administrator should be allowed reasonable attorney's fees paid to counsel, when necessary for his own protection or that of the estate, as determined by the character of the services and the value of the estate; and also for services rendered on the final settlements of his accounts, except as to items which are successfully contested by the heirs and distributees; but, if he claims a credit for the entire compensation of counsel for services rendered on the settlement, when some of the items are successfully resisted by the heirs, the entire credit may be rejected.

3. *Liability of administrator for rents; to distributees and to creditors.* An administrator is chargeable with the rent of lands, which he failed to collect by reason of the insufficiency of the sureties on the note taken by him, unless it is shown that he used due diligence to ascertain their solvency and sufficiency; but, if it appears that the estate had been declared insolvent, that the creditors were present at the public renting, and informed him that the sureties were good, they can not charge him with the rents thereby lost; nor can the distributees, in such case, unless such charge creates a surplus for distribution after the debts have been paid.

APPEAL from Greene Probate Court.

Heard before the Hon. W. C. OLIVER.

The contentions in this case arose on the final settlement of the accounts of Thomas Clark, as administrator *de bonis non* of the estate of John M. Eubank, deceased. The case has been already before this court, (78 Ala. 73), and the facts fully reported. The only new aspects presented on this appeal are the rulings of the Probate Court upon different items of the administrator's account. On final settlement the distributees moved to charge the administrator *de bonis non* with amounts claimed to have been properly chargeable to the ad-

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ministratrix-in-chief, Mrs. Eubank, viz, rent of land and hire of slaves belonging to intestate's estate, which had been lost to the estate under circumstances that amounted, as was alleged, to a *devastavit* by Mrs. Eubank, and which could have been recovered by the administrator *de bonis non* by the exercise of proper diligence. It was shown by the evidence that John M. Eubank, had died in February, 1861, and that he had left an estate consisting of a tract of land and twenty-three slaves; that his widow, Susan V. Eubank, took charge of the lands and slaves, keeping the slaves together and farming the land, without an order of court or other lawful authority therefor, until her death in March, 1866. The distributees allege in their motion that at the time of Mrs. Eubank's death and the appointment of Thomas C. Clark as administrator *de bonis non*, the bondsmen of Mrs. Eubank were solvent and owned large estates in Greene county, sufficient to satisfy the indebtedness of the said Mrs. Eubank to said estate, and that they continued to own said estates for many years after the appointment of said Clark as administrator *de bonis non* as aforesaid; that said Clark, though he knew the extent of the liability of Mrs. Eubank to the estate, failed and neglected to enforce a settlement and collection of said liability, by which negligence great loss was sustained by these distributees. The distributees having elected to claim the rents of the land from 1861 to 1866, and the hire of the slaves from the time of Mrs. Eubank's appointment as administratrix to the emancipation of the slaves, the court, in stating the accounts, so charged Mrs. Eubank with said rents and hires, and charged said Clark with the balance thus found against the administratrix-in-chief, with interest. To this Clark excepted. The administrator asked for a credit of a fee to J. B. & T. C. Clark for preparing a petition to sell the lands of the estate, but which he did not prosecute because he became satisfied afterwards that it was not to the interest of the estate to sell. To this credit the heirs objected, and the court sustained the objection. Upon objection by the heirs the court refused to allow the administrator credit for voucher 41 for a fee of \$250.00, paid Thos. W. Coleman for legal services. The court sustained the objection, stating that it would not allow for the payment of separate attorney's fees, but would consider what would be a proper allowance for attorneys when all of them had been presented, and then make an allowance in bulk. To this action of the court the administrator excepted. Other claims for attorney's fees were disallowed on the same grounds. Other questions arising on the settlement are noticed in the opinion.

J. P. McQUEEN and THOS. R. ROULHAC, for appellant.

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J. B. HEAD and SEAY & DEGRAFFENRIED, *contra*.

CLOPTON, J.—On the former appeal (78 Ala. 73), we held, that it was the right of the distributees to have ascertained, whether or not Mrs. Eubank, the administratrix-in-chief, had committed a *devastavit*, the fact and amount to be determined on the same principles as if her personal representative had made a regular settlement; and whether the administrator *de bonis non* could have collected the amount by reasonable diligence. On motion of the distributees, the court stated an account of the administration of Mrs. Eubank, and charged the appellant with the balance ascertained to be due. The intestate died in February, 1861, and the administratrix made and gathered the crop of that year, and was properly charged with the proceeds. The administratrix, without an order of court, kept the estate together, which consisted of land, and slaves and other personal property, after 1861 until the emancipation of the slaves in 1865. The court, in stating the account, charged the rents of the land and hires of the slaves for the years succeeding 1861, the distributees having so elected.

The right to elect, and the liability to account for rents and hires, are not disputed. The controversy on this branch of the final settlement relates to the amounts charged, as not sustained by the evidence. The testimony of the several witnesses should be considered and weighed in the light of the disordered and troublous condition of the country, and the character of the circulating medium during the period of the administration. The consideration of the financial and other difficulties and embarrassments which complicated the management, and endangered the preservation of estates, the courts, while enforcing the cardinal rule, that administrators are bound to act in good faith, and are required to exercise that skill and diligence which a prudent man uses in the management of his private affairs of similar nature, have been disposed to deal leniently where good faith is shown. It is said: they “are not insurers and not expected to be infallible.” *Moore v. Randolph*, 70 Ala. 575; *Nunn v. Nunn*, 66 Ala. 35; *Stewart v. McMurray*, at present term. And in anticipation of the necessity of a settlement of the administration of Mrs. Eubank, it was observed in the opinion delivered on the former appeal, that, “the peculiar state and condition of the country, and the depreciated currency in circulation during the greater part of her administration, should have been considered.”—*Eubank v. Clark*, 78 Ala. 73.

The concurrent testimony of the witnesses is, that the best thing Mrs. Eubank could have done was to have kept the family and slaves on the plantation, and that she did very well if

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she supported the family and the plantation. Under the adverse circumstances of the war, she kept the estate intact, took care of the slaves, and maintained herself and children, who are the distributees. The evidence shows prudent management. This, however, did not absolve her from the duty of obtaining proper authority; and having kept the estate together without an order of court as required by the statute, the liability to account for rents and hires arises on the election of the distributees; but, under the circumstances, the accounting should not be exacting, nor, when witnesses of equal credibility and opportunities differ in their estimates, should the *highest* value proved be charged, unless it is sustained by the attendant and controlling facts and circumstances. The court adopted the highest value, as estimated in good money, by the witnesses on the part of the distributees. The circulating medium during these years of the war consisted of Confederate States treasury-notes and convertible equivalents, which constantly and rapidly depreciated until it became valueless. There was no gold or silver or United States money in circulation.—*Morris v. Morris*, 58 Ala. 443. There are no *data* on which to base a reliable opinion as to what amount a slave would have hired for, if payment in good money had been demanded. One of the witnesses testifies, that in such case, they could not have been hired at all. The witness, who made the highest estimate, also testified that having some minors' slaves to hire, he paid in 1863 sixty-five dollars for keeping a man and his wife each about thirty years of age, and hired a man, his wife and two or three children for their food and clothes or had to pay something for their keeping. The other witness on the part of the distributees said the hire for 1865 was worth nothing; and there is other evidence showing that the hire was not worth anything from 1862 to 1865 inclusive, inasmuch as they could not be profitably employed. Besides; the court not only charged the hires on the basis of the highest estimated values, but of the highest estimated value of each slave as if hired separately. The fair inference from the record is, that some of them were in families. In such cases, the proper criterion is the value, if hired as families. It was not the duty of the administratrix to separate parents and children in hiring the slaves. The foregoing observations are applicable in some respects to the rents as charged. There is evidence tending to show, that lands could not be rented, the men being in the army, and the available mules and horses having been taken by the government. The question here is, whether the administrator *de bonis non* is responsible for a loss to the estate by reason of his negligence. Upon an examination of the entire evidence, and on consideration of the state and condition of the

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country, we are satisfied, that had the administrator *de bonis non* promptly compelled a settlement of the administration in chief, he could not reasonably have succeeded in recovering any amount from the sureties of the administratrix. The amount of the *devastavit*, with the interest thereon, should be stricken from the debit side of the account.

When an administrator, in good faith, procures the services of counsel for his own protection or that of the estate, he should be allowed a credit for reasonable compensation paid counsel, considered in connection with the value of the estate and the character of the services; but no allowance will be made in respect to litigation in which the administrator is at fault. If on the final settlement of the administration, he engages with the heirs in unsuccessful litigation as to items of debit or credit, the compensation should be apportioned, so as not to charge the estate with the increase of compensation in consequence of the assistance and services rendered in such unsuccessful litigation.—*Smyley v. Reese*, 53 Ala. 98; *Smith v. Kennard*, 38 Ala. 695; *Moore v. Randolph*, 70 Ala. 575. While the better practice would have been to have allowed separate compensation for the fees in defending the bill filed against the administrator by the heirs; when the value of the estate, the character and results of the litigation, and the evidence as to the value of the entire services, are considered, we are not clearly convinced that the aggregate amount allowed by the court is erroneous. The claim as presented being for a credit for the *entire* compensation of counsel for the services rendered on the final settlement, the court could properly have rejected the credit. *Smyley v. Reese*, *supra*.

Whether or not the administrator should be held responsible for the loss of the rent of the land for 1867, by reason of the insufficiency of the sureties on the rent note, should be considered in a double aspect—as the distributees may or may not be interested in the distribution. The evidence is not sufficient, as against the distributees, to show that the sureties were generally reputed to be solvent, or that the administrator used requisite diligence to ascertain that they were good and sufficient. But the estate had been declared insolvent, and the administrator testified, without contradiction, that several of the creditors, who only were supposed to be interested, were present at the renting, and that, in addition to inquiries of the neighbors, he inquired of the creditors, who informed him that the sureties were good, and told him to accept the note. The administrator having acted on this information in good faith, it would be unjust to charge him with the loss of the rent, in favor and for the benefit of the creditors. The distributees alone moved to charge the administrator with the uncollected

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amount of the rent note. If, by charging him with the amount of the rent note which he failed to collect, a surplus will remain for distribution among the heirs, he should be charged therewith ; but, if no surplus will remain, then the debit should be stricken from the account. And on the same principle, if no surplus remains, the charge for a failure to file objections to the claims of H. B. Robinson should be disallowed.—*Eubank v. Clark*, 78 Ala. 73.

We discover no error in the other rulings of the court.

The judgment is reversed, and the cause remanded, with directions to the Probate Court to restate the account in accordance with this opinion.

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Statutory Action in Nature of Ejectment.

1. *What title will authorize recovery.*—To authorize a recovery in ejectment, or the statutory action in the nature of ejectment, the plaintiff must, as a general rule, have a legal title at the commencement of the action, and that title must continue up to the time of the trial ; but, when he sues as the owner of an estate *per autre vie*, which terminates before the trial, though he can not recover the possession, he may recover mesne profits, or damages.

2. *Merger of life-estate in fee.*—When the owner of an estate for life acquires by purchase the remainder or reversion fee, the less estate becomes merged in the greater, and his title is an absolute fee, on which he may recover in ejectment, or the statutory action in the nature of ejectment, commenced before he acquired the fee.

3. *Executor's power to sell under will.*—When the will confers on an executor "full power to purchase or sell any property he may think necessary or proper, * * or to dispose of any property for the benefit of the estate," the power of sale is not limited to lands in which the testator had a present right of possession and enjoyment, but includes also an estate in remainder or reversion.

4. *Title of purchaser from executor.*—If an executor, having power under the will to sell, sells and conveys in payment of his individual debt, and fails to account for the money on settlement, this does not affect the legal title of the purchaser ; and if the devisees have any remedy, it is to recover the purchase-money as unpaid.

5. *Permanent improvements, under adverse possession for three years ; and possession under color of title in good faith, limiting liability for rents.* A suggestion of adverse possession for three years, and the erection of permanent improvements (Code, §§ 2951-54), and possession under color of title in good faith, whereby the liability for rents is limited to one year before the commencement of the suit (*Ib.* § 2966), are inconsistent defenses, and can not be pleaded together ; and when so pleaded, if the defendant will not elect between them, both of them should be struck out by the court.

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APPEAL from the Circuit Court of Greene.

Tried before the Hon. S. H. SPROTT.

This action was brought by Percy Hairston and Ada Hairston, children of Mrs. Mary H. Hairston, and grand children of Mrs. Ann Womack, against Andrew J. Dobbs, to recover the possession of a store-house and lot at Haysville station in said county, with damages for its detention; and was commenced on the 16th February, 1884. The defendant pleaded, 1st, not guilty; 2d, possession under color of title in good faith, whereby his liability for rents was limited to one year before the commencement of the suit; 3d, adverse possession for three years, and the erection of permanent improvements; and, 4th, a special plea *puis darrein continuance*, averring that plaintiffs' only title was the life-estate of Mrs. Ann Womack, which they had acquired by purchase, and which had terminated by her death after the commencement of the suit. The plaintiffs moved to strike out the third plea, because inconsistent with the second, and also demurred to the second, third, and fourth pleas; but their motion and demurrer were overruled. It was admitted on the trial, as the bill of exceptions states, "that the plaintiffs are the children and the only heirs of Mrs. Mary H. Hairston, deceased, who died in February, 1865; that, at the time of Mrs. Hairston's death, Mrs. Ann Womack owned a life estate in the lands here sued for, being her dower in the estate of her deceased husband, and Mrs. Hairston owned the reversion in fee dependent on said life estate; that one J. A. McAlpine became the owner, by purchase and conveyance, of said life estate of Mrs. Womack, and afterwards, in 1872, sold and conveyed the same to plaintiffs for \$25;" that Ada Hairston became twenty-one years of age in 1884, a short time before the commencement of this suit, and Percy Hairston attained his majority in February, 1885, but his disabilities on account of infancy were removed by a special act of the General Assembly, approved December 8th, 1880, which was in evidence. It was admitted, also, that Mrs. Womack died in March, 1885, after the commencement of this suit. The defendant claimed title under a purchase and conveyance from Charles Hays, as the executor of the last will and testament of Mrs. Mary H. Hairston; and he offered in evidence the will, with its probate, and the conveyance executed to him by said Hays. By the provisions of said will, the testatrix devised and bequeathed her entire estate, except some specific legacies, to her two children, the plaintiffs in this suit; and it contained a power of sale to the executor, which is copied in the opinion of the court. The executor's deed to the defendant was dated February 26th, 1879, and recited the payment of \$450 as its consideration; but the de-

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fendant testified, on cross-examination, that a part of this amount was the extinguishment of a debt which said Hays owed him. The plaintiffs objected to the admission of the will as evidence, on the ground that the sale was not authorized by the power therein contained; and they excepted to the overruling of their objection. This being, in substance, all the evidence, the court charged the jury, on request, that they must find for the defendant, if they believed the evidence. The plaintiffs excepted to this charge, and they now assign it as error, together with the rulings on the pleadings and evidence above noted.

J. B. HEAD, for appellants.—(1.) Notwithstanding the termination of Mrs. Womack's life estate, the plaintiffs were entitled to recover damages up to the time of her death.—*Kennedy v. Holman*, 19 Ala. 734; *Mason v. Storrs*, 34 Ala. 179; 61 N. Y. 393; 3 Strobb. S. C. 501; 2 Cowen, 355, authorities cited in brief; 1 Sedg. Dam. 245; 2 Suth. Dam. 344. (2.) The second and third pleas set up inconsistent defenses and could not be pleaded together.—*Turnipseed v. Fitzpatrick*, 75 Ala. 297. (3.) The infancy of Percy Hairston at the commencement of the suit, if available at all under the facts, could only be taken by plea in abatement. (4.) The will did not confer on the executor power to sell an estate in reversion; nor was he authorized to sell in payment of his own debt.

G. B. MOBLEY, *contra*. (1.) To maintain ejectment, or the statutory action in the nature of ejectment, the plaintiff must have title and the right of possession at the commencement of the action, and that title must continue up to the time of the trial.—*Scranton v. Ballard*, 64 Ala. 402; 74 Ala. 334; 1 Black, U. S. 454; Tyler on Ejectment, 76. At the commencement of the suit, the plaintiffs had only the life estate of Mrs. Womack, which terminated by her death before the trial; and they could not recover on the fee, which accrued to them on her death.—11 Amer. Rep. 480; Tyler on Ejectment, 383. (2.) The executor had full power, under the will, to make the sale and conveyance to the defendant.—*Babot v. Wetmore*, 17 N. J. Eq. 250; *Stephens v. Minor*, 24 N. J. Eq. 358. (3.) The act relieving Percy Hairston of the disabilities of non-age is unconstitutional; and if he had no right to maintain the action in his own name, his co-plaintiff can not recover. (4.) Sections 2951–54, and sections 2966, Code of 1876, are merely cumulative remedies. At common law, a *bona fide* purchaser under color of title could recover the value of permanent improvements, by way of reduction, *pro tanto*, from the mesne profits.—4 Ala. 367; 13 Ala. 41; 29 Ala.

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498; 37 Ala. 606; Waterman on Set-off, 485. There can be no recovery of mesne profits, until there is a judgment for the recovery of the land.—54 Ala. 300; 15 Wall. 215; Sedg. & W. on Trial of Title, § 649.

STONE, C. J.—Among the admitted facts in this case are the following: The store-house and lot, the subject of the present suit, were part of the dower-estate of Mrs. Ann Womack, grandmother of the plaintiffs, with reversionary fee in Mrs. Hairston, her daughter, the mother of the plaintiffs in this action. Mrs. Womack sold her dower-interest-life-estate to McAlpine, who subsequently sold his interest, thus acquired, to plaintiffs. This was several years before the present suit. Mrs. Womack was living when this action was instituted, but died before the trial came off. The Circuit Court gave the general charge in favor of the defendant, and there was verdict and judgment accordingly.

It is contended for the appellee that, to maintain the action of ejectment, or our statutory substitute for it, the plaintiff must not only have a right of recovery at the commencement of the suit, but that right must continue to the trial. That is certainly the rule, so far as the recovery of possession is concerned.—*Scranton v. Ballard*, 64 Ala. 40. But ejectment, or its corresponding statutory action, under our system, has a two-fold object. It recovers possession, and also rents, or mesne profits. If it fails in its primary object, by reason of the termination of the title from natural causes, or inherent imperfection, *pendente lite*, being sufficient when the suit was brought, it may nevertheless be continued for the recovery of mesne profits, or damages.—*Doe, ex dem. v. Holman*, 19 Ala. 734; *Mason v. Storrs*, 34 Ala. 179; Sedg. on Dam. 120, *margin*; 3 Sutherland on Dam. 344; *Robinson v. Campbell*, 3 Wheat. 212, 223-4; *England v. Slade*, 4 T. R. 682; *Chandler v. Jost*, at present term. The plaintiffs in this case have shown a *prima facie* right to recover mesne profits and costs, and the minority of Percy Hairston, if there be anything in it, is not so raised as that we can consider it.—*Pleasants v. Erskine*, at present term.

Mrs. Hairston left a will, under which the plaintiffs in this suit, her only children, are the chief beneficiaries. The will was probated and established, and Hays, the executor, qualified and entered upon the trust. Under the provisions of the will, the fee of the property in controversy, if not diverted under a power in the will, afterwards to be considered, would and did vest in the plaintiffs, to take effect at the death of the tenant in dower, Mrs. Womack. If no change was wrought in the tenure under and by virtue of the power of sale conferred by

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the will, it would seem that, when McAlpine conveyed the life-estate to the plaintiffs, that life-estate and the remainder or reversion in fee became centered in them, and, the lesser estate merging in the greater, their title became an absolute fee.—Tiedman on Real Property, § 63; 2 Black. Com. 177.

The will of Mrs. Hairston, however, conferred on her executor "full power to purchase and sell any property he may think necessary and proper; * * * or, to dispose of any property for the benefit of my estate."

It is contended for appellants that this power did not authorize the executor to sell the property involved in this suit, because Mrs. Hairston's interest in it was not a present right of enjoyment, but only an estate in reversion or remainder. The record does not inform us how she acquired her title, and therefore we can not affirm whether it was a reversion or a remainder. It is immaterial, however, whether it was the one or the other, so far as the merits of this controversy require us to consider the question. We hold that the will did authorize Hays, the executor, to sell the property, and to vest in Dobbs, the purchaser, all the estate and interest Mrs. Hairston owned at the time of her death.—*Bacot v. Wetmore*, 17 N. J. Eq. 250; *Lippincott v. Lippincott*, 19 *Id.* 121; *Stephens v. Milnor*, 24 *Id.* 358. The deed from Hays, as executor, vested the legal title in the latter; but it did not confer a right of possession until the life-estate fell in, by the death of Mrs. Womack.

If any of the purchase-money was paid in any thing other than money, and if such payment did not enure properly and of right to the benefit of the Hairston estate, or in liquidation of a liability which equitably rested upon it, and which has not been otherwise accounted for in the Hays' settlement, this will not change the title Dobbs acquired into a mere equity. If complainants have any remedy in such case, it is a right to recover such balance as unpaid purchase-money.

The defense, in one of its phases, is rested on the averment that Dobbs, "and those whose possession he has, for three years next before the commencement of the suit, have had adverse possession" of the premises sued for, and have made permanent improvements thereon.—Code of 1876, §§ 2951-4. The defense also asserts that Dobbs has held possession under color of title, and in good faith.—Code, 1876, § 2966. These defenses are incompatible, and can not both be insisted on.—*Turnipseed v. Fitzpatrick*, 15 Ala. 297. Defendant must be put to his election, which he will rely on. If he will not elect, the court should strike out both of said lines of defense.—*McQueen v. Lampley*, 74 Ala. 408.

Reversed and remanded.

Dobbs v. Hairston.*Statutory Action in Nature of Ejectment.*

1. *Permanent improvements, and liability for rents ; adverse possession for three years, and possession under color of title.*—When the defendant is in possession under color of title, has had adverse possession for three years, and has erected permanent improvements (Code, §§ 2951-54, 2966), he may waive his claim for improvements, and restrict his liability for rents to one year next before the commencement of the suit; or he may claim the full value of his improvements, and waive his right to claim a restricted liability for rents; but he can not restrict his liability for rents, by pleading possession under color of title, and set off the value of the improvements erected against the rent for the limited period.

APPEAL from the Circuit Court of Greene.

Tried before the Hon. S. H. SPROTT.

This is the second appeal in this case during the present term. See the case reported *ante*, p. 589. The proceedings on the second trial, now presented for revision, are stated in the opinion of the court.

G. B. MOBLEY, for appellant.

J. B. HEAD, *contra*.

CLOPTON, J.—To so much of the action as seeks to recover mesne profits, the defendant originally interposed two special defenses; 1st, Adverse possession for more than three years next before the commencement of the suit, and permanent improvements, under sections 2951-2954 of the Code; and 2d, Exemption from responsibility for damages or rent for more than one year before the commencement of the suit, by reason of holding possession under color of title in good faith, under section 2966. When this case was before us on a former appeal, *ante* p. 589, we held that these defenses are incompatible, and both can not be insisted on; that the defendant must be put to his election on which he will rely, and if he will not elect, the court should strike out both lines of defense. On another trial, after the remandment of the cause, the defendant having failed to elect, the court, on motion of plaintiff, struck from the file all the pleas setting up both defenses. This action is in accord with our former ruling.

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The defendants, immediately thereafter, filed without objection a special plea, setting up the defense of holding possession under color of title in good faith, and then offered to file another plea of set-off or recoupment—the value of permanent improvements against the rent,—which the court refused to allow to be filed. Had the court permitted the second plea to be filed, under the circumstances, it would have stultified the previous ruling, by allowing both the incompatible defenses to be reintroduced on the record.

In actions for the recovery of land and mesne profits, the period during which the defendant may be charged for the rent, and the circumstances under which he may claim pay for his improvements, are regulated by the statute. He may restrict his responsibility, if holding possession under color of title in good faith, and waive any claim for improvements, or may waive the limitation of his liability, subjecting himself to full rent for the whole period of his occupation, and claim allowance for the full value of his improvements, if he has had adverse possession for three years before the commencement of the suit. But he can not restrict his responsibility for rent under section 2966, and set-off the value of the improvements against the rent for the limited period.—*Turnipseed v. Fitzpatrick*, 75 Ala. 297. By re-filing the plea setting up the defense of holding possession under color of title in good faith, under section 2966, and going to trial thereon, the defendant elected to rely on that defense. By such election, he is precluded to show that he has made permanent improvements and the value thereof, in order to set-off the same against the rent. The rulings of the court are in harmony with these views.

Affirmed.

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Bill for Divorce.

1. *Confessions, admissions and consent, as evidence.*—On grounds of public policy, a divorce will not be granted by consent of parties, by collusion between them, nor on their confessions or admissions, express or implied; and a sworn answer only puts in issue the allegations of the bill.

2. *Collusion implied from pleadings.*—On bill for divorce by the husband, charging adultery by the wife, evidence being taken by both parties, and the litigation conducted with zeal and earnestness on both sides, until about the time when the cause was submitted for decision, when, by agreement of record, the cause was submitted on the testi-

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mony of the complainant's witnesses alone, and an agreement as to alimony and solicitor's fees; *held*, that the record suggested collusion between the parties, and stimulated vigilance on the part of the court in the examination of the evidence on which a decree of divorce was founded.

3. *Proof of adultery*.—While a divorce may be granted on the ground of adultery, on circumstantial evidence only, "the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion" that the offense had been committed; and where the evidence points to only two occasions, and the circumstances proved, in each case, are susceptible of an innocent construction, a divorce should not be granted.

APPEAL from Marshall Chancery Court.

Heard before Hon. S. K. McSPADDEN.

This was a bill in equity filed on July 1, 1885, by Lewis R. Powell, against his wife, Sarah Ann Powell, and sought a divorce *a vinculo matrimonii*, on the ground of adultery. The nature of the allegations contained in the bill of complainant and the answer of the respondent, and the character of the testimony are sufficiently shown in the opinion. The chancellor rendered a decree divorcing the parties, the cause being submitted, as shown by the record, upon bill and answer, depositions of specified witnesses, and an agreement of the solicitors of the respective parties. The latter instrument recites "that the said defendant is entitled to be decreed the sum of one hundred and fifty dollars as alimony and the same to be in full satisfaction of all demands and rights of alimony except as to compensation for her solicitor. * * * That the complainant pay to John G. Winston, Jr., the sum of fifty dollars as compensation for services rendered defendant in this suit. And the complainant pay the costs herein to be taxed by the register of this court. Witness our hands this the 17th day November, 1885. Hamill & Lusk, solicitors for complainant; Jno. G. Winston, Jr., solicitor for defendant."

The decree rendered is here assigned as error.

R. C. BRICKELL, for appellant.—(1.) "A divorce suit, while on its face a mere controversy between private parties of record is, as truly viewed, a triangular proceeding *sui generis*, wherein the public or government occupies in effect the position of a third party."—2 Bish. Mar. and Div. § 230 (6th ed.); *Ribet v. Ribet*, 39 Ala. 348; and to it the maxim *consensus tollit errorem* can be but of narrow application. The court, as guardian of the public rights and interests which are involved, will see that a divorce be not granted, the *status* of the citizen be not changed, unless the case be made, and clearly proved, in which the law authorizes a divorce and the change of *status*.—2 Bish. Mar. and Div. § 230. A divorce, the dissolution of a marriage, does not rest in the volition of the parties. (2.) The

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bill should have alleged the name of the person with whom the adultery was committed, or that such person was unknown. 2 Bish. Mar. and Div. 601, *et seq.*; *Wood v. Wood*, 2 Paige, 108. (3.) The evidence is insufficient to support the decree. *Richardson v. Richardson*, 4 Port. 467; *Mosser v. Mosser*, 29 Ala. 313; *Jeter v. Jeter*, 36 Ala. 391.

HAMILL & LUSK, *contra*.—(1.) The decree of the chancellor, being based on his finding of facts, will be confirmed unless the record shows that his finding was clearly wrong.—*Sawyers v. Baker*, 77 Ala. 46; *Graham v. Hughes*, 77 Ala. 590; *Smith v. Vaughan*, 78 Ala. 201; *Nooe v. Garner*, 70 Ala. 443. (2.) The conclusion of the chancellor that complainant was entitled to relief could be drawn from circumstantial evidence. 2 Bish. Mar. and Div. § 614. (3.) When the testimony is credited, the facts it establishes will be viewed, not only separately but in conjunction; for they interpret one another. Thus contemplated, they may lead to the inference of guilt when separately they would not.—2 Bish. Mar. and Div. § 615, and authorities cited in note 6.

CLOPTON, J.—The institution of marriage, established by divine, and perpetuated and guarded by human, authority, constitutes the foundation of organized society, protects private and public morality and virtue, and moulds the character of the citizens of the commonwealth. While an agreement to marry is regarded generally a civil contract, by its consummation contractual relations of a special kind are formed, and the *status* of the parties and their duties to each other and to the public, are ascertained and fixed. Extraordinary and exclusive personal relations are created to continue so long as both parties may live, and public interests are involved in the strict and complete observance of the marital vows and covenants. The marriage relation can not be rescinded or annulled by the mere volition of the contracting parties. Its preservation is deemed so essential to the public weal, that it can not be dissolved except by the sovereign power, or by a court of competent jurisdiction for causes prescribed by law on sufficient allegations and satisfactory proof.

The settled policy of the State, founded on these considerations, prohibits a divorce being granted by consent, or collusion, or on the confessions of either or both of the parties, or for want of pleading, or mispleading, or *laches* in making defense. A sworn answer to a bill for divorce is not evidence, and has no other effect than to put in issue its allegations; and a divorce can not be granted on a decree *pro confesso*. The rights and interests of society and the government—of the

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community at large—being considered involved, such suits are regarded of a tripartite character. “A divorce suit, while on its face a mere controversy between private parties of record, is, as truly viewed, a triangular proceeding *sui generis*, wherein the public, or government, occupies in effect the position of a third party.” 2 Bish. Mar. & Div. § 230; *Ribet v. Ribet*, 39 Ala. 348. In the case cited, it is said: “The court is bound to act for the public in such cases, and so has the right to hear proofs not strictly within the allegations of the bill and answer.” By the loose practice too prevalent, and the facility with which divorces are sometimes obtained, the courts may be, in a measure, responsible for the extending want of a due appreciation of the sanctity of the marital relation. Whether or not defense be made, the court should feel bound by the highest considerations of duty and public policy to watch the interests of the community, otherwise undefended and unprotected. The appearance or indication of consent express or implied, or of collusion should stimulate the vigilance of the court, and a closer scrutiny of the evidence.

These observations have been suggested by the presentation made by the present record. It presents lamentable scenes of domestic discord, exhibitions of ungovernable temper, and recurring broils between two persons, who had sustained to each other the marital relation for more than thirty-five years, and to whom children were born. The bill and answer abound with criminations and recriminations of cruelty and violence on the part of each, and of infidelity. These disagreements culminated in separation in 1881, but continued thereafter, the parties living near each other on the land of complainant. The bill was filed in May, 1885, by the husband. Several witnesses were examined by each, the complainant and defendant, and the litigation was carried on with zeal and earnestness as between really adversary parties until about the submission of the case for final decree. The cause was submitted on the depositions of the witnesses examined on behalf of complainant and an agreement by the solicitors in respect to alimony. None of the depositions of the several witnesses examined by the defendant were put in evidence or noted by the register.

The sudden termination of real controversy, and the manner of submission, indicate that the decree is the result of some understanding or agreement between the parties. In divorce suits, the parties may control and conduct the cause, as they see proper, in respect to any questions or agreements not affecting the merits nor public interests, by having reference to the procurement of the decree. Any agreement will be enforced against the wife, notwithstanding her coverture, made in the course of the proceedings, without being overreached or

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imposed on by her husband, and not violative of the public policy. To such agreements the maxim *consensus tollit errorem* applies, but has no application to a *decree* of divorce, obtained by virtue of any consent or agreement direct or indirect, to be divorced. 2. Bish. Mar. & Div. §§ 235-7. Without imputing any blame to the solicitors, who, not infringing any moral or professional duty, merely acted in accordance with the wish and understanding of their clients, whose interests they represented, the omission to introduce on the hearing, and have noted for the consideration of the chancellor, the evidence taken by defendant, the agreement as to the alimony to be allowed, and the tacit withdrawal of objection and resistance to a decree, should, not only not relax, but stimulate vigilance in the examination and scrutiny of the evidence noted, with a view to determine whether the record presents a case in which a divorce ought to be granted.

Cruelty, actual violence, nor disregard of ordinary wifely duties, constitute no ground of divorce in favor of the husband. All such allegations of the bill may be eliminated from the case. The decree is founded on the ground of adultery. Waiving consideration of the sufficiency of the general allegation of the bill, that the defendant "has on divers days and occasions committed adultery with divers persons," without naming any person, or stating any excuse for the omission,—the objection not having been assigned as cause of demurrer—the question arises as to the sufficiency of the evidence to establish this ground for divorce. We recognize the difficulty of proving adultery by direct evidence, it being usually an act of secrecy, preferring darkness to light. Circumstantial evidence, on which reliance must generally rest, may be sufficient. It has been said: "The only general rule that can be laid down on the subject, is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion." This is the second bill brought by complainant to obtain a divorce. He admits that in his first suit he did not charge his wife with adultery, and it does not appear, that such act was assigned as a cause of the separation. The men, whom he suspected, were examined by him to prove the fact, and positively deny ever having had sexual intercourse with the defendant. The only two positive circumstances shown by the testimony which may be regarded of a suspicious nature, occurred in the day time and at public places. One was under the floor of the mill, where the band wheel was. It was in the morning, and at the mill, where defendant had her corn ground. The witness states, that Shields, the miller, was going in the direction of the wheel, and defendant was standing four or five feet off, saying and doing nothing;

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that when Shields came out, he said he was mending the band, and witness, after examining, saw that the wheel had not been turned that morning; and Shields denies any improper intimacy. The other occasion was in the public road some distance from home, when the brother of complainant testifies he overtook the defendant walking arm in arm with an unknown man in a very friendly manner, and as closely together as they could get. He accosted her, passed, and saw no more of them. From these circumstances, in connection with suspicions and impressions, we presume adultery was inferred. The suspicions and impressions of witnesses are both incompetent and insufficient. The circumstances do not lead to the guilt of defendant "by fair inferences as a necessary conclusion," but are susceptible of a reasonable interpretation consistent with her innocence. The evidence is not as clear and satisfactory as is required by the rule established by our former decisions. *Richardson v. Richardson*, 4 Por. 467; *Mosser v. Mosser*, 29 Ala. 313; *Jeter v. Jeter*, 36 Ala. 391. Under this rule, "the inference of adultery could not be drawn from circumstances reasonably reconcilable with the assumption of innocence;" and in such case the inference should not be drawn especially when all disproving and explanatory evidence is withheld from the court.

But as defendant has shown an entire want of regard for her own character, by impliedly assenting to a decree for divorce on the ground of adultery, the decree is reversed, and the bill will be dismissed without prejudice.

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Action against Railroad Company for Personal Injuries.

1. *Amended complaint; statute of limitations.*—When an amended count does not introduce a new cause of action, but merely varies the allegations as to the cause of action set out in the original complaint, the statute of limitations is not available as a defense, unless the bar was complete at the commencement of the suit; as where the original complaint claims damages on account of injuries sustained by plaintiff in falling from a platform at a railway station, by reason of the company's failure to provide a light, and an amended count describes the platform and steps with particularity, showing the necessity for a light on account of their dangerous condition.

2. *Direct and remote injuries.*—The negligence complained of being the failure of the defendant railway company to provide a light at the ticket office, where plaintiff was injured by falling from the platform in the dark, although the fall was caused by a false step, it can not be as-

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sumed, as a matter of law, that the want of a light was not the efficient cause of the false step and consequent fall.

3. *Accident, and contributory negligence.*—No action would lie, if the plaintiff's false step (and consequent fall) was entirely accidental, and without fault on the part of the defendant; nor if he was guilty of contributory negligence; but the evidence as to these matters being indeterminate, and resting in reference, the questions are properly submitted to the determination of the jury.

4. *Exemplary damages.*—Exemplary damages may be awarded, in an action against a railroad company for personal injuries, if the negligence was so gross as to evince an entire want of care, and sufficient to raise a presumption that the defendant, being cognizant of the probable consequences, was indifferent to the danger to which the persons or property of others was thereby exposed.

5. *Charges asked; right of party to examine.*—A party has the right to read and examine written charges requested by the adversary party, since an examination may be necessary to enable him to determine his own action in reference to them.

6. *Reading charges to jury.*—When charges asked are given, and so marked by the presiding judge, it is a legal right of the party to read, or have them read aloud to the jury.

7. *Hearsay inadmissible.*—While the plaintiff may prove the nature of a dangerous surgical operation, to which he was subjected in consequence of the injuries received by him, as circumstances to be considered in determining his anxiety and suffering, he can not be allowed to testify to what the surgeon said to him at the time, such declarations being mere hearsay.

APPEAL from Greene Circuit Court.

Tried before the Hon. S. H. SPROTT.

This action was brought by John W. Arnold against the Alabama Great Southern Railroad Company, a domestic corporation, and was commenced on the 2d July, 1885. The complaint sets out that the plaintiff purchased a ticket from defendant's depot agent at Boligee, in Greene county, Ala., a station on defendant's railroad, in February, 1885; that he was in said depot or station-house when the north bound train on said road blew for the station; that the train was on schedule time, which was after seven o'clock P. M.; that it was very dark when he attempted to leave the depot across a narrow platform, about four feet above the ground, to take the train; that a narrow stairway or steps, about three and a half feet wide, led from the platform to the ground; that there were no lights on the platform, and but a dim light on the inside of the depot, so that he missed the narrow steps, and while feeling his way for them carefully with his foot he stepped on some hard substance, and when he bore his weight on it his foot slipped from under him and he fell from the platform to the ground, severely cutting and bruising his private parts on the corner of the steps or other hard substance, which caused him great pain, endangered his life, necessitated a dangerous surgical operation, confined him to his room for months, compelling the use of an instrument to void his urine; that he had to give up the

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profitable employment in which he was engaged and had incurred great expense for medical and surgical treatment, and laid his damages at ten thousand dollars. The negligence of the defendant specially complained of in the original complaint was the failure to light up the platform and steps. An amended count to the complaint subsequently filed alleged that the defective construction of the platform and steps rendered them unsafe and dangerous. This latter count was added more than twelve months after the happening of the injury complained of. The defendant pleaded—1. The general issue. 2. Contributory negligence. 3. The statute of limitation of twelve months to the amended complaint. 4. That the injury complained of was the result of pure accident. On these pleas issue was joined. During the examination of the plaintiff, who testified as a witness in his own behalf, he was permitted, against the objection of the defendant, to testify that he was told by Dr. Mastin (the surgeon who operated upon him) that to relieve him would require a dangerous operation. The objection of the defendant to this part of plaintiff's testimony was overruled by the court, and defendant excepted.

After the oral charge by the court, the defendant's counsel requested a number of charges in writing, some of which were given and some refused by the court. Defendant's counsel requested the court to read, or to permit defendant's counsel to read the charges given by the court to the jury; this was refused by the court, who handed said charges to the jury, stating that these charges marked given expressed correct legal propositions and that those refused did not. To this refusal of the court to read or permit read to the jury the charges requested by the defendant and given by the court, defendant excepted. The defendant also excepted to the action of the court in permitting plaintiff's counsel opportunity to examine said charges requested by the defendant, before giving them to the jury.

The charges asked by defendant, and refused by the court, were: 1. "If the jury believe all the evidence, they must find for the defendant under the first count of the complaint." 2. "If the jury believe all the evidence, they must find for the defendant under the second count of the complaint." 3. "If the jury believe all the evidence, they are not authorized to give to the plaintiff exemplary damages." 4. "If the jury believe all the evidence, they are not authorized to find that the injury to the plaintiff was wanton or intentional, or to assess exemplary damages against the defendant."

There was a verdict and judgment for the plaintiff for nine thousand dollars. The defendant appeals, assigning for error the refusal of the court to give the charges above stated and the other rulings excepted to.

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SAM'L F. RICE and J. B. HEAD, for appellant.—1.* The court erred in refusing to give the first charge asked by the defendant, *i. e.*, that the jury should find for the defendant under the first count of the complaint, if they believed all the evidence. That count charged that the plaintiff received the injuries complained of by the negligence of the defendant in not providing sufficient light at the depot, and that "the darkness of the night then and there prevailed," and that the plaintiff was without fault. These words are "*descriptive of the identity of that which is legally essential to the claim, and can not, therefore, be rejected.*" If the proximate cause of plaintiff's injuries was other than those alleged in said count, the defendant was entitled to a verdict.—*Dill v. Rather*, 30 Ala. 60; *Toledo, &c., Railway Co. v. Foss*, 88 Ill., 551; *Long v. Doxey*, 50 Ind. 385; *Lewis v. Flint & Pere Marquette R. R. Co.*, 54 Mich. 55 (s. c., 52 Am. Rep. 790); *Waldhier v. Hannibal, &c., R. R. Co.*, 71 Mo. 514; *Edens v. Hannibal, &c., R. R. Co.*, 72 Mo. 212. Under said first count, plaintiff is not entitled to recover, unless the evidence established the legal relation of cause and effect between the *particular negligence or wrong described in that count* and said "fall and injuries" complained of in that count.—43 Am. Rep. 762; *Lewis v. Flint & Perre Marquette R. R. Co.*, cited above. Nor is he entitled to recover if he did not himself use ordinary care and caution.—Beach on Contributory Neg. 7 to 9. 2. If plaintiff knew his surroundings, and that they were dangerous, and chose to take the risk without even asking for a light he is a volunteer and can not take advantage of his own lack of prudence. Where circumstances demand precautionary measures and an accident happens from the omission of them, this is want of ordinary care.—Moak's Underhill on Torts, 215; Railway Accident Law by Patterson, pp. 18-23; *Railroad Co. v. Aspell*, 23 Penn. Stat. R. 149 *et seq.* The settled doctrine of the Supreme Court of Alabama is that if passengers on railroad trains *expose themselves unnecessarily to danger*, they must do so at their peril.—*Ala. G. S. R. R'd Co. v. Hawk*, 72 Ala. 115-116, and cases there cited; see also, 23 Penn. State Rep. 149. 3. The second or new count of the complaint introduces the additional allegation that the steps and platform were unsafe and dangerous. Defendant's third plea answers that count. The substance of the plea is that this new matter, first introduced on April 20, 1886, was barred by the statute of limitations of one year.—*Mohr v. Lemle*, 69 Ala. 180; *Deshler v. Hodges*, 3 Ala. 511. 4. The court erred in allowing the plaintiff to prove by his own testimony that Dr. Mastin informed him that the operation was a dangerous one.—*Vicksburg & Meridian Railroad v. O'Brien*, 119 U. S. Rep. 102-3.

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5. Exemplary or vindictive damages are not recoverable, except "in cases where one knowingly, wantonly, and recklessly does an act fraught with probable injury to person or property, and ultimately producing such injury or damage."—*Lienkauff & Strauss v. Morris*, 66 Ala. 414; *Wilkinson v. Searcy*, 76 Ala. 176; 76 Ala. 492; 42 Penn. State Rep. 499; 94 Ind. 598.

J. B. HEAD, *contra*, cited Sedgwick on Damages, 719; *S. & N. R. R'd Co. v. McLendon*, 63 Ala. 266; *Rhodes v. Roberts*, 1 Stew. 145.

CLOPTON, J.—The original complaint, which contained but one count, sets forth as the cause of action, that the plaintiff, on February 10, 1885, sustained injuries by reason of the negligence of defendant in failing to provide light at a station, called Boligee, where persons desiring to take passage on the trains were required to purchase tickets, and to which place the plaintiff went for the purpose of purchasing a ticket, to take passage on a train which arrived after dark. After the expiration of more than one year from the time of the injury, the complaint was amended by the addition of another count, which alleges the same injury, as occurring at the same time and from the same cause, as in the original complaint, but introduces a minute description of the height, dimensions, and condition of the platform on which the ticket-office was erected, and of the steps leading thereto. To these additional allegations the defendant pleaded the statute of limitations. The amendment does not introduce a new cause of action, but varies the allegations as to a matter already in issue. The injury, and the negligence complained of as the cause, are the same as set forth in both counts; and while it is averred that the construction of the steps and platform rendered them unsafe and dangerous, this does not constitute the negligence alleged to be the cause of the injury, on account of which a recovery is sought; but, as we interpret the count, the allegations are intended to show a greater, and more imperative duty to provide a light, from the failure to do which, it is distinctly and expressly averred in the new count, the injuries resulted. Under neither count is the plaintiff entitled to recover for any negligence, other than the failure to provide a light.—*T. W. & W. Ry. Co. v. Foss*, 88 Ill. 551. The statute of limitations will not avail, when the amendment does not introduce a new cause of action, unless the bar is complete at the time of the institution of the suit.—*Dowling v. Blackman*, 70 Ala. 303.

The right of the defendant to the affirmative charges requested is rested on two grounds—that the evidence fails to establish the legal relation of cause and effect between the par-

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ticular negligence or wrong described, and the fall and injuries complained of; and that plaintiff's own negligence contributed thereto. Unquestionably, the negligence of the defendant must be the proximate cause of the injury to entitle the plaintiff to recover; that is, that the injury sustained was such, as might have been reasonably anticipated in the ordinary and usual course of events. No difficulty arises when the damage directly follows the wrong; when they are so proximately cotemporaneous, that no time or occasion is afforded for the operation of another instrumentality. It ordinarily arises, when there is an intervening cause, or several causes contributing to the result. Generally, in such case, the law will attribute the injury to the last cause, when it follows in immediate succession. But the agency nearest in point of time is not regarded in every case as the proximate cause in contemplation of law. The injury will be referred to the nearest and immediate agency only when it is independent of the original act or conduct of the defendant. If the intervening causes are merely incidental, having been set in motion by the first cause, and are not new and independent forces sufficient of themselves to cause the disaster, the law passes these, and traces the injury to the wrongful act, which puts them in operation. The principle is, that if the injury is produced by the wrongful act during the continuance of its causation, it will be regarded as the proximate cause; but as too remote, though furnishing the occasion, when the injury occurs after the act is completed and terminated, by the intervention of another and independent cause. "On the intervention of other agencies, the inquiry should be, is the original wrongful act an antecedent, efficient, and dominant cause, which put the other causes in operation?"—Cooley on Torts 70; *Insurance Co. v. Bonn*, 95 U. S. 117; *Billman v. In. Cin. & LaF. R. R. Co.*, 40 Amer. Rep. 230; *Jordan v. Hyatt*, 4 Gratt. 151; *Ricker v. Freeman*, 9 Amer. Rep. 267; *Sheridan v. Brooklyn C. & N. R. R. Co.*, 36 N. Y. 39; *East Tenn., V. & G. R. R. Co. v. Lockhart*, 49 Ala. 315.

But it is unnecessary to pursue this line of consideration further; for it will be observed, there is no pretence of a third independent cause having intervened; but the contention is that the proximate cause was, the slipping of plaintiff's foot from under him, as he was stepping from the platform; and that the fall and injury were, either purely accidental, or the result of a want of ordinary care and caution on his part. In the cases to which our attention has been cited, there was, either an independent intervening cause, or the action of the independent will of the party injured, or contributory negligence. In one of the cases, *Henry v. St. Louis, Kan. City & No. Ry. Co.*, 43 Amer. R. 762, the plaintiff, being a passen-

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ger, was directed to change cars at a way station, and having entered the caboose attached to another train, was ordered to get out by an employee, because the train was not ready. After standing a short time on the platform, he stepped on an adjacent track, and while standing there was injured by another train. It is said: "If any injury had happened to him while in the act of prudently obeying the order to get out of the caboose, such injury would have been the proximate result of his expulsion, but after he was out of the caboose he was entirely free to select his own position, and did so after some minutes of meditation and consultation as to what course he should pursue." And further: "If the plaintiff, at the time he was injured, had been on his way to the caboose or otherwise lawfully crossing the track, and before crossing the same had looked and listened and could neither see nor hear an approaching train, he would undoubtedly have a right of action." The principle extracted is, that his expulsion was not the proximate cause, though the occasion, of his injury, by reason of having put himself, in the exercise of his independent will, in an unlawful position, after the causative power of his expulsion had terminated; but if in consequence of the order to leave the caboose, he had been in a position where he could be lawfully, and had exercised due care, the injury would have been referred to the expulsion. It may be conceded, that the immediate occasion of the fall and injury of plaintiff was the slipping of his foot. But back of this recurs the question, was a light necessary to enable persons to see their way safely from the ticket-office to the cars, and was the want of such light the efficient and dominant cause, producing the false step, which caused plaintiff's foot to slip? Though no action lies if the fall was accidental, and without the fault of defendant, these are questions resting in inference, and were properly submitted to the jury. There being evidence tending to show, that the fall and injury of plaintiff immediately followed his leaving the ticket-office, it cannot be affirmed as matter of law, that the absence of light, if such be the fact, was not the proximate cause. *E. T., V. & G. R. R. Co. v. Lockhart, supra.*

As long and well settled in this State, contributory negligence is matter of defense, and the burden of establishing it is on the defendant. Unless there is no conflict in the evidence, and no material fact left to inference, unless on the undisputed facts, and all inferences that may be reasonably deduced, it follows as a conclusion of law, the affirmative charge was properly refused. The argument is, that plaintiff was in no possible danger while he remained in the ticket-office; that he knew the surroundings and the circumstances which endangered him, and that they demanded precautionary measures; notwith-

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standing which, he chose to take the risk without calling for light or assistance, the omission of which is want of ordinary care. The principle invoked is, that if a passenger unnecessarily exposes himself to danger, he does so at his own peril; and that to put his life in jeopardy to save himself from mere inconvenience, is inexcusable rashness. The law unquestionably devolves on railroad companies the obligation, not only to properly construct and keep in safe condition their ticket-office, and the platforms and approaches thereto, but also to provide sufficient and suitable light when the trains arrive and depart in the night-time.—*Mo. & Eu. R. R. Co. v. Thompson*, 77 Ala. 448.

The plaintiff was at the station by the implied invitation of defendant. He had purchased a ticket, intending to take passage on the expected train; and there is evidence tending to show that he remained in the ticket-office until the approach of the train was announced by the blowing of the whistle. The necessity of persons desiring to take passage on the trains, and the invitation to the travelling public to go to the ticket-office, is a standing and continuing assurance, that due precaution will be taken to insure safety. If the defendant held out to the plaintiff that the situation and condition of the platform and steps were such as to afford safe and suitable passage without a light from the ticket-office to the train, less vigilance and care will be required.—*Gaynor v. Old. Col. & New Ry. Co.*, 100 Mass. 208. Ordinary care, as generally defined, is such care as men of common prudence use in like position and circumstances. The plaintiff can not be deemed, *prima facie*, guilty of a want of ordinary care, if he did what all other persons, in like circumstances, had done for years without accident or injury.—*City Council of Montgomery v. Wright*, 72 Ala. 411. If therefore, by the fact that defendant held out the place as safe and suitable, by the plaintiff's familiarity with the situation, and by its constant and actual use, he was induced to *bona fide* believe that he could pass with safety, using due care in walking, and he did use such care, he can not be charged with having unnecessarily exposed himself to danger, or with a want of ordinary care and caution. On the other hand, if the plaintiff knew that it was dangerous to attempt to pass in the dark, and did not honestly believe that he could do so without accident or injury, and there was a light convenient, of which he would have had the benefit, and he omitted to avail himself of its advantage, these are circumstances, which may be considered in determining whether the plaintiff unnecessarily exposed himself to danger. But these material facts resting in inference, it results that the question of contributory negligence was properly submitted to the jury.

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The circumstances under which exemplary damages may be assessed, have been so often, so fully, and so recently considered, that further discussion is not required. The record not informing us that special instructions were asked, relating to the circumstances under which such damages may be allowed, a mere statement of the rule will suffice. Without resting its application to be determined by the shadowy and indefinable line that distinguishes gross from ordinary negligence, a somewhat more specific rule has been established by our decisions. That rule is, when negligence is so gross as to evince an entire want of care, and is sufficient to raise a presumption that the defendant, being cognizant of the probable consequences, is indifferent to the danger to which the persons or property of others may be exposed—"a conscious indifference to consequences"—exemplary damages may be awarded. It is not necessary that the injury shall be wilful.—*Wilkinson v. Searcy*, 76 Ala. 176; *Leinkauf v. Morris*, 66 Ala. 406; *S. & N. Ala. R. R. Co. v. McLendon*, 63 Ala. 266. In the case last cited, the plaintiff sustained injuries caused by the failure and neglect to keep in proper repair a bridge, which the railroad company had erected on its right of way on a public highway, and which had been out of repair for several weeks. It was held, that the plaintiff might recover exemplary damages, if the negligence was gross, and that a charge that the plaintiff can not recover such damages was properly refused, the degree of negligence being a question for the determination of the jury. The same ruling is applicable in the present case. Had the instruction been given in the terms written, the court would have invaded the province of the jury.

It is difficult to conceive any step or proceeding taken in open court, by either party, in the conduct and progress of a trial, of which the adversary party has not the undoubted right to be informed, and the opportunity to examine, and deny or avoid. Concealment and secrecy, in such case, are violations of the rights of litigants, and contravene the policy of public trials, and the right of every party to be heard. There is no error in the court having permitted the attorneys of the plaintiff to examine the written charges requested by defendant. An examination was proper, and may have been necessary to enable them to determine whether to waive, except, or ask explanatory or qualifying instruction.

The uniform practice was, prior to the enactment of section 3109 of the Code, and the general custom since has been to give instructions orally, and read, or caused to be read to the jury, charges required by the statute to be in writing. The section provides: "Charges moved for by either party must be in writing, and must be given or refused in the terms in

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which they are written ; and it is the duty of the judge to write 'given' or 'refused,' as the case may be, on the document, and sign his name thereto, which thereby becomes a part of the record, and must be taken by the jury with them on their retirement." The purpose of requiring requested instructions to be in writing is to prevent misunderstanding between the judge and the attorney. The judge is required to write *given* or *refused*, and sign the same, that they may become parts of the record ; and the jury are allowed to take them during their deliberations, to avoid errors of memory, or failure of recollection, or the confusion of charges as given or refused.—*Miller v. Hampton*, 37 Ala. 342. It was not intended by providing that the jury may take the charges with them on their retirement, which applies alike to those *given* and those *refused*, to abrogate the practice of reading, or causing them to be read to the jury, and to substitute handing them to the jury therefor. Not having expressly declared the mode of giving instructions, the statute merely requires the judge to write *given* on such charges as are given, in conformity with the common practice. Reading the charges is calculated to impress the jury that instructions prepared by counsel and given are entitled to equal consideration with the general charge of the court, and to enable them more thoroughly to comprehend the principles of law applicable to the different aspects of the case, by having their attention thus specially directed to the instructions. All communications between the court and the jury should be had in the hearing of the parties. It was intended by the statute to prohibit withholding the charges from the jury, after having been read to them. It was the right of the defendant to have the instructions moved for and given read to the jury.—*Langworthy v. Myers*, 14 Clarke (Iowa), 18.

While the nature and danger of the operation to which plaintiff was subjected are proper circumstances to be considered in determining the anxiety and mental and physical pain caused thereby, and while it may have been proper to show the mere fact that he was *informed*, without calling for the declarations themselves, it is not permissible to prove by the plaintiff for any purpose what the surgeon said to him. They do not fall within any of the exceptions to the general rule of the inadmissibility of hearsay evidence.—*Blackman v. Johnson*, 35 Ala. 252; *Vicksburg & Mer. R. R. Co. v. O'Brien*, 119 U. S. 99.

Reversed and remanded.

Stoelker v. Wooten.

Action on the Case by Landlord, for Conversion of Rent Cotton.

1. *Landlord's remedy against purchaser of tenant's crop, whereby statutory lien is destroyed.*—A special action on the case lies in favor of the landlord, against a purchaser of the tenant's crop with notice of the landlord's statutory lien, whereby the lien was lost and destroyed; but a prior waiver of his lien by the landlord, in favor of the purchaser, is a defense to such action.

2. *Same; agreement waiving lien.*—An agreement between the landlord and a merchant who had made advances to the tenants, taking mortgages on their crops and stock, and who was unwilling to make additional advances for the next ensuing year without a waiver of the landlord's lien in his favor; by which it was stipulated that the landlord would waive his lien, that the accrued rents for the year might be applied to the merchant's debts, that he would continue to make advances for the ensuing year, but limited to actual necessities, under the supervision of the landlord's agent, at actual cost with interest added, and that he would, at the end of the year, transfer his mortgages to the landlord, on payment of the several debts due him,—such agreement is an absolute and unconditional waiver of the landlord's lien for the past year, but the waiver as to the ensuing year is conditional, being dependent on the performance of the stipulated acts by the merchant; and these conditions not having been performed, the agreement is no defense to an action by the landlord for the sale of the cotton raised by the tenants during that year.

3. *Nonsuit; what is revisable.*—When a nonsuit is taken on account of a charge to the jury, to which exception was reserved (Code, §3112), rulings on demurrer can not be considered on error.

APPEAL from Marengo Circuit Court.

Tried before the Hon. W. E. CLARKE.

This action was brought by Otto Stoelker against Council B. Wooten, to recover damages for the conversion by the defendant of the crops grown on plaintiff's plantation in Marengo county, for the years 1883 and 1884, upon which plaintiff had a lien for rents, and was commenced February 9th, 1885. The complaint avers that Stoelker owned a plantation in Marengo county, known as the "Kirksey place," which he rented to a number of tenants, who procured advances from the appellee, Wooten, who was a merchant in the neighborhood; that these tenants had become indebted to said Wooten, who held mortgages on their stock and crops to secure said indebtedness—for advances made during the year 1883; that about the middle of December of that year said Wooten applied to one King, the agent of Stoelker, to get a waiver from Stoelker of his landlord's lien upon the crops of these tenants for the year 1883,

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and upon the crops to be grown by them in 1884, in favor of said Wooten, representing to King that unless this was done he, Wooten, would foreclose his mortgages and thus break up the tenants on the place; that King went to Montgomery, at the instance of Wooten, and submitted this proposition to Stoelker, viz: that if he, Stoelker, would waive his landlord's lien in favor of Wooten for the years 1883 and 1884, he, Wooten, would not foreclose his mortgages on said tenants, but would advance them again for the year 1884, letting them have only necessary supplies at cost, with interest added; that he would make the advances under the supervision of Stoelker's agent, and that his settlements with the tenants would be in the presence of said agent, and that at the end of the year 1884, upon the payment by Stoelker of the balances that then might be due to him, Wooten, from said tenants, he would transfer the mortgages upon them to Stoelker; that Stoelker consented to this proposition and agreed to waive his lien for the years 1883 and 1884. The complaint further avers that Wooten wholly failed to comply with his agreement in this, that though he received the crops of 1883 and applied the proceeds to the accounts of these tenants; he failed to supply them with necessities only during the year 1884, but furnished them with many things that were not necessary, and at prices greatly above cost and interest; that he failed to submit said accounts to Stoelker's agent, but settled with said tenants without the presence and knowledge of said agent; that he failed and refused to transfer the mortgages to Stoelker, that he might be reimbursed for his rents, and that by reason of the wrongful conduct of the defendant plaintiff had lost his lien on the crops of said tenant, wherefore he brings this suit.

The defendant pleaded the general issue, the statute of limitations of one year, and that the conversion complained of was by the consent of the plaintiff first secured. On these pleas issue was joined. After all the evidence was before the jury, the court, at the request of the defendant, gave the following charge: "If the jury believe from the evidence, that the defendant took the cotton, which he is sued for taking in this action, with the consent of the plaintiff, he can not recover in this action, although the defendant may not have complied with the contract in all of its terms offered in evidence by the plaintiff." To this charge the plaintiff excepted, took a nonsuit, with bill of exceptions, and appealed to this court.

PITTS & CHRISTIAN, and THOS. R. ROULHAC, for appellant.

NORBORNE CLARKE, and G. W. TAYLOR, *contra*.

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CLOPTON, J.—Appellant brings a special action on the case to recover damages for the loss of his lien for rent on cotton, which the defendant, having acquired the possession, applied to his own use with notice of the lien. The conversion of the cotton and notice of the lien are not disputed. The defense is, that the defendant received and applied it to his own use with the consent of plaintiff. The defendant, who was a merchant, had made advances during 1883 to the tenants of plaintiff, taking as security mortgages on their crops, stock, and farming implements. The tenants being unable to pay both the rents and advances, an arrangement was entered into by the parties in December of that year in reference to plaintiff's waiver of his lien as landlord, and the application of the crops grown in 1883 and to be grown in 1884. Though the evidence is in conflict as to some of the terms of the arrangement, on the hypothesis of the charge given at the instance of defendant, we must assume as true the version which the evidence on the part of the plaintiff tends to establish, and on such assumption consider the question involved in the proposition of the instruction. From this evidence it appears, that the plaintiff waived his lien for the rents due and to become due for 1883 and 1884 in favor of the defendant, that they might be applied to the indebtedness of the several tenants to him, upon condition that he would not foreclose his mortgages, and would advance to the tenants during 1884 only necessary supplies, charging only the actual cost, with the interest added; that the advances should be made under the supervision of the plaintiff's agent; and none of the tenants should be closed out without a settlement first made in his presence, and upon payment by each tenant of his individual account for both years, the defendant would transfer to plaintiff for his reimbursement the mortgages on such tenant's property. The evidence as to performance of these conditions was conflicting; but the court instructed the jury, that the plaintiff can not recover if defendant took the cotton in controversy with his consent, although defendant may not have complied with all the terms of the contract offered in evidence by the plaintiff.

The waiver of the lien is set up defensively; and whether or not it is essential to the sufficiency of the defense, that defendant shall show performance on his part, depends upon the nature and character of the agreement—whether the stipulations are conditions; in other words, if the parties were reversed, and defendant were suing for a breach of the agreement, whether he would have to aver and show performance on his part to entitle him to recover. Notwithstanding rules have been formulated for the interpretation of conditions, the courts regard them as of little practical value, and now generally

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agree, that the interpretation must "depend upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject matter to which it relates."—2 Par. on Con. 667; *Nesbitt v. McGehee*, 26 Ala. 748. By express words, plaintiff's acceptance of the proposition of defendant is, *upon condition* that he would do and perform all the stipulations contained therein. While no technical words will constitute a condition, if such is not the intention or understanding of the parties, they may be properly considered in connection with the other expressions and provisions of the contract, and the objects contemplated. The plaintiff as landlord had a superior lien on the crops. The defendant was unwilling to continue making advances to the tenants unless he could obtain in his favor a waiver of this lien. In this condition of affairs the proposition was made and accepted, so as to enable the tenants to carry on their farming operations during the succeeding year. The purpose of the defendant was to obtain payment for the past advances and security for future advances; and the purposes of plaintiff was to prevent the indebtedness, in favor of which he waived the lien, being enlarged beyond the actual cost, with interest added, of necessary supplies, and indemnity by transfers of the mortgages. The stipulations, that the advances should be made under the supervision of plaintiff's agent, and settlements made in his presence, are supplementary, designed to guard the other stipulations. Such are the subject matter, terms, and sense of the contract, by which the intention and understanding of the parties must be determined in the light of the rules applicable in such cases.

A general rule is: where by the terms of a contract, an act to be done by one party precedes the performance of the act by the other party, which is the consideration, performance by the other party can not be regarded as a condition; for by the terms it appears, that the party intended to rely upon his remedy. The defendant was authorized to take possession of, and appropriate the cotton grown in 1883, before the stipulations on his part were to be performed. The indebtedness for the past advances had accrued, and the crop had matured, at the time the contract was made. A present application was clearly intended. The waiver of the lien on the cotton of that year must be treated as unconditional. On the same principle, the transfer of the mortgages will not be considered a condition. The defendant does not stipulate to transfer them except upon payment of the tenant's indebtedness for both years; and the disposition of the cotton, and appropriation of the proceeds, might become necessary to entitle plaintiff to the transfers.

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As regards the waiver of the lien on the cotton grown in 1883, and the transfer of the mortgages, the agreements are mutual and independent. But a further question is, whether the agreement to waive the lien on the cotton to be grown in 1884, and to advance only necessary supplies at actual cost with interest added, are not dependent and conditional? It does not follow that because some of the stipulations are independent, others may not be conditions. The rule sustained by the later decisions is, that in a contract some of the stipulations, relative to the same subject matter, may be mutual and independent, and others dependent and conditional.—*Kane v. Hood*, 13 Pick. 281; *Sheeren v. Moses*, 84 Ill. 448; 2 Benj. on Sales, § 858, note k. The agreements to waive the lien on the cotton to be grown in 1884, and to make advances during that year, are executory. The advances would necessarily be continuing, extending through the year, and their character and amount were peculiarly under the control of the defendant, for though it was stipulated, that they should be under the supervision of the agent, as he resided several miles distant, it could not have been contemplated, that he should be present when each advance was made to each tenant. By the agreement the plaintiff subordinated his lien to the payment of the advances, and it was important, that he should protect himself against all unnecessary accumulation of the indebtedness, which self-interest might prompt the defendant to permit, and perhaps to encourage. The advances were to be made for the purpose of enabling the tenants to make the crop to which the waiver of the lien related—the same subject matter. From the terms of the agreement, the nature of the subject matter, and the reason and sense, it appears that the intention was, not to rely upon an action to recover damages for the breach of that stipulation, but to make its performance a condition on which the waiver of the lien on the cotton to be grown in 1884 should be operative.

In order to bring the defense within the influence of the rule, that when a person is authorized by contract to take and dispose of property, he can not be charged for a tort on account of any act in reference thereto, which is warranted by the contract and done while it is in force, the defendant must show an agreement to waive the lien for the rent of 1884, and that the cotton might be applied to the payment of the tenants' indebtedness, binding and enforceable against the plaintiff. To do this, it is incumbent on him to show performance of the stipulation in respect to the advances to be made during 1884, without which he could not maintain an action on the agreement. We do not intimate any opinion as to the sufficiency of the evidence to establish what in fact is the agree-

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ment; but have considered the charge solely in reference to the agreement offered in evidence by the *plaintiff*, because it is the hypothesis on which the proposition of the charge is based, and thus considering it, hold it to be erroneous, in that it substantially asserts the proposition that the plaintiff is not entitled to recover for the loss of his lien for the rent of 1884, if defendant took the cotton by authority of the agreement, although he may not have performed the stipulations in respect to the advances.

The plaintiff having taken a non-suit with a bill of exceptions, we can not consider the ruling of the court on the demurrer to the replication.—*Levishon v. Edwards*, 79 Ala. 293.

Reversed and remanded.

Ala. Great Southern Railroad Co. v. Chapman.

Action against Railroad Company for Personal Injuries.

1. *Direct and remote injuries.*—Where plaintiff was struck and injured, while walking along a path by the side of a railroad track, by a cow which was thrown from the track by the engine, and which fell against plaintiff after striking the ground, the injury is the proximate consequence of the engine striking the cow; and the railroad company is liable on account of it, if there was negligence on the part of the engineer, although he was guilty of no negligence towards the plaintiff personally.

2. *Statutory duties of railroad engineer.*—Negligence is imputed by law to a railroad engineer, when he fails to comply with the statutory requirements in order to avoid injuries (Code, § 1699); but the statute does not require him to endeavor to stop his train, except “on perceiving an obstruction on the track;” and when he perceives a cow, not on, but near the track, on the embankment, and the animal attempts to cross the track when the engine is so near that he can not stop the train by the use of all the means in his power, the statute does not require him to make a vain and useless attempt.

3. *Same.*—A charge which instructs the jury that the engineer “is required to use all means known to skillful engineers, even greater diligence than the requirements laid down in the statute,” is erroneous, since the statute prescribes the rule of diligence, and the courts can not add to it; and its requirements are, that he shall use all means “within his power” known to skillful engineers.

4. *Contributory negligence.*—Although the plaintiff, while walking along a path near the railroad track, on the company’s right of way, was a trespasser, this did not constitute contributory negligence, if she made due use of her senses to discover an approaching train, and, on its nearer approach, used proper exertions to place herself beyond peril.

APPEAL from Sumter Circuit Court.

Tried before the Hon. S. H. SPROTT.

[Ala. G. S. Railroad Co. v. Chapman.]

This action was brought by Eliza Chapman against the Alabama Great Southern Railroad Company, a domestic corporation, and was commenced 28th July, 1884. The complaint avers that on the 15th August, 1883, while plaintiff was walking in a path near the track of defendant's road, an engine on said road threw a cow from the track and against the plaintiff, whereby she was greatly injured. The complaint further avers that the engineer of said engine and train failed to blow the whistle or ring the bell as said train entered the corporate limits of the town of Livingston (where the injury occurred), and to continue to blow said whistle or ring said bell at intervals until he reached the depot in said town, and failed to use all means within his power, known to skillful engineers, in order to stop said train and thus prevent the injury to plaintiff. (Rev. Code, 1876, § 1699). To the complaint the defendant pleaded the general issue, and specially the contributory negligence of the plaintiff. After the introduction of a number of witnesses by both parties in regard to the circumstances attending the infliction of the injury of which the plaintiff complains, the court gave the following charges, at the request of the plaintiff: "2. If the jury believe from the evidence that the engineer failed to use all means known to skillful engineers to stop the train and thereby prevent the injury, or if they believe from the evidence that the engineer failed to ring the bell or blow the whistle of the train on entering the corporate limits of the town of Livingston, and to continue to blow said whistle or ring the bell at intervals till he passed through said town, then this was such negligence as would make the defendant responsible for such injuries as is shown by the evidence the plaintiff suffered, if said injuries were the result of such negligence; and the plaintiff would be entitled to a verdict, unless it appears that she was guilty of negligence on her part; and the fact that she was on the side of the railroad track, if it is a fact, would not be such negligence as would prevent a recovery, if the jury find from the evidence that she exercised reasonable diligence in trying to get beyond the reach of danger." "4. Ordinary diligence does not meet the reasonable requirements in managing and running a railroad train, but the engineer is required to use all means known to skillful engineers, even greater diligence than the requirements laid down in the statute." "5. The jury, in considering the question of contributory negligence, must not confound conditions with causes. The mere fact that a person is in an improper position, when, if he had not been there, no damage would have been done to him, does not preclude him from recovering. Such circumstance is only a condition to the happening of the damage, not a cause of it, and if the jury believe from the

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evidence that the position of the plaintiff, at the time she was struck was merely a condition to the injury and not a cause of it, and that it had not the natural tendency, such as exists between cause and effect to place her in the direct way of the danger, which resulted in the damage to her, then the defense of contributory negligence can not prevail." To the giving of these charges the defendant excepted. The defendant then requested the following charge in writing: "If the jury believe from the evidence that the plaintiff was upon the right of way of the defendant when the injury complained of occurred, then she was a trespasser, and if she was injured by the negligence of the railroad company she can not recover, unless such negligence was willful; mere gross negligence," which was refused. There was a verdict and judgment for the plaintiff, and the defendant takes this appeal, assigning as error the giving of the charges asked by the plaintiff, and the refusal to give the charge asked by the defendant.

A. G. SMITH, for appellant.—1. Railroads are only responsible for injuries when they have been guilty of negligence. If there was no negligence in throwing the cow from the track, there could be no negligence in the consequential injury to the plaintiff by being struck by the cow. The plaintiff can not recover except for injuries resulting proximately as the natural result of the cause.—69 Ala. 373; Add. on Torts, § 1355 (note 2); *Ib.*, § 567; 1 Brick. Dig. 522, § 8; 29 Ala. 318; 13 Ala. 490. While the natural and proximate result of striking the cow was to throw it from the track, the striking of the plaintiff by the bounding of the cow after striking the ground, was a remote and consequential injury for which no recovery can be had against the railroad. 2. Charge numbered 4 should not have been given. It asserts the proposition that the railroad is to be held to a greater degree of diligence than the statute requires. This too, when the evidence showed that the plaintiff was a trespasser by being on the embankment of the railroad.—*Pratt Coal and Iron Co. v. Davis v. Davis*, 79 Ala. 308. If the engineer had seen the plaintiff and saw that she was getting off the right of way he would not have been compelled to stop his train.—67 Ala. 533; 62 Ala. 621. 3. The charge asked by the defendant should have been given.—See Am. Rep., Vol. 1, 339; Vol. 19, 364; Vol. 22, 112; Vol. 48, 719; Vol. 30, 185.

JNO. J. ALTMAN, and J. H. LITTLE, *contra*.—(No brief came into the hands of the Reporter).

CLOPTON, J.—The case presented by the record does

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not call for the application of the principles which control when a trespasser on the track or right of way of a railroad company is injured by personal contact with the locomotive or train. Without having been first discovered, the plaintiff was injured, while walking along a path on the right of way of defendant, by being struck by a cow, which was thrown from the track of the railroad by the engine. On the undisputed facts, the defendant was not guilty of want of care or negligence in respect to any duty which the company owed plaintiff *individually*. No question of wanton, or reckless, or intentional negligence is involved; and instructions as to the degree and character of negligence requisite to liability, when a trespasser, who is guilty of contributory negligence, is injured, are inapplicable, tend to mislead the jury by multiplying and confusing the issues, and should be refused when asked by either party.

It is insisted, that the act of defendant was only the remote cause of the injury. When the cow was thrown by the engine, it struck the ground, bounced, and fell against plaintiff. The bounce and fall of the cow was the immediate cause, but it was merely incidental, and was not an independent agency, which had no connection with the act of the defendant. The direct cause was put in operation by the force of the engine, which continued until the injury; and injuries directly produced by instrumentalities thus put in operation and continued, are proximate consequences of the primary act, though they may not have been contemplated or foreseen. The relation of cause and effect between the primary cause and the injury is established by the connection and succession of the intervening circumstances. If the cow was thrown from the track by the negligence of defendant, the injury can not be regarded as a purely accidental occurrence, for which no action lies.—*East Tenn., V. & G. R. R. Co. v. Lockhart*, 79 Ala. 315; *Ala. Gt. So. R. R. Co. v. Arnold*, ante p. 600.

There being no negligence towards the plaintiff personally, her right to a recovery depends upon the issue of negligence in striking and throwing the cow from the track. The only negligence averred and claimed consists in the alleged failure of the engineer to comply with the statutory requirements in regard to blowing the whistle and ringing the bell, and using all means in his power known to skillful engineers in order to stop the train. The statute imputes negligence, when there is a failure to comply with the statutory requirements, and imposes on the company liability for all damages to persons or property resulting from such failure. The court evidently intended to so instruct the jury; but a fatal defect in the charges relating to this aspect of the case consists in an erroneous state-

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ment of the statutory rule, as to when it becomes the duty of the engineer to use all means in his power known to skillful engineers in order to stop the train. The charges assert that a failure to attempt to stop the train, without reference to the statutory circumstances on which the duty arises, is negligence. The statute does not require the engineer to endeavor to stop the train, except on *perceiving some obstruction on the track of the road*. If the evidence of the engineer be believed, when he first discovered the cow, she was about one hundred yards in front of the train down the embankment; on sounding the cattle alarm, she started up the embankment towards the track; the train was an excursion train, loaded with people, and on a heavy down grade; and he was unable to stop it by the use of all the means in his power. An animal near the road is not an obstruction on the track in the meaning of the statute; and if the cow, suddenly and unexpectedly started towards the track when the train was so near, that the use of all the means in the power of the engineer would not have availed to stop the train in time to avoid a collision, there was no violation of his statutory duty in not making a vain and useless attempt.—*East Tenn., V. & G. R. R. Co. v. Bayliss*, 77 Ala. 429. The charges of the court operated to withdraw this evidence from the consideration of the jury, and to virtually instruct them, that, notwithstanding they might believe it, and the inferences which might be drawn therefrom, the engineer was guilty of negligence if he failed to use all means within his power known to skillful engineers in order to stop the train.

In reference to this subject, the court further charged the jury, at the instance of plaintiff, that "the engineer is required to use all means known to skillful engineers, even greater diligence than the requirements laid down in the statute." The negligence complained of is statutory. The legislature prescribes the requirements, a failure to comply with which would constitute negligence. While it is true, as a general rule, that railroad companies, managing and operating trains by steam power, will be held to the same degree of care and diligence which careful and prudent men use in the management of interests and enterprises of similar importance, magnitude, and danger, when the statute makes that negligence which is not at common law, and prescribes its constituents, the courts can not add thereto. The statute requires the engineer to use all means *within his power* known to skillful engineers; but the charge of the court requires him to use all means known to skillful engineers though they may not be in his power nor at his command. A different rule would apply, if it were alleged that the injury was caused by the negligence of the company

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in failing to provide suitable and proper appliances for the purpose.

As to the special defense of contributory negligence it may be remarked, that the question is, not whether plaintiff's negligence caused, but did it proximately contribute to her injury? While she may effectually contribute by putting herself in peril, mere exposure to danger will not, of itself, disentitle her to recover. She was a trespasser on the right of way of the defendant when she received the injury, but this is no defense unless her negligence contributed to produce it. To go on the track of a railroad, especially in a town or city, where passing and re-passing are frequent, does not, of itself, constitute contributory negligence, but may be a condition remotely contributing to a subsequent injury, and may be the initiative of contributory negligence. Having voluntarily assumed the risk, the plaintiff assumed the duty of observing due precautions against danger—the duty of lookout and reasonable care and diligence to avoid injury. Whether the plaintiff was guilty of contributory negligence, that disentitles her to recover, though the defendant may have been negligent, depends on the solution of the questions whether or not, while walking on the track of the railroad, she duly used her senses of hearing and sight to discover an approaching train in time to avoid danger, and if so, whether or not, on discovering its approach she made proper exertions to place herself beyond peril—not whether she merely stepped off the track so that the train could pass without striking her, but at sufficient distance to afford reasonable safety from injury, arising from a casualty happening to the train while passing? Nothing short of this would, in such case, be the exercise of due care to avoid injury. The defense of contributory negligence will fail or prevail as these questions may be answered by the jury in the affirmative or negative.—*Frazer v. S. & N. Ala. R. R. Co.* Charge No. 5, requested by plaintiff is defective in ignoring the duty of plaintiff to exercise ordinary care to avoid the injury, by efforts commensurate with the peril to which she had voluntarily exposed herself, and moreover is argumentative.

Reversed and remanded.

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ACCOUNT.

1. *General charge ; when this court will presume the giving of justified by the evidence.*—When the bill of exceptions states that the “plaintiff introduced his verified account, and this being all the evidence,” the court gave a general charge in his favor; this court will presume, in the absence of anything to the contrary in the record, that the evidence justified the charge. *Hyde v. Adams, 111.*

ADVANCES TO MAKE CROP.

1. *Advances to make crop ; what articles are within statute.*—Fertilizers not being among the articles specially mentioned in the statute (Code, § 3286), a written instrument executed in consideration of a horse advanced or sold on credit, which declares that, without such advances, it would not be within the power of the maker to procure the necessary “teams, provisions, farming implements and fertilizers to make a crop,” does not create a statutory lien, though it may have effect as a mortgage, *Bozett & Wimberly v. Potter, 476.*

ACTION.

JOINT ACTION, See PL. AND PRACTICE, 4.

1. *Action ; legal injury the basis of.*—An act can not be the foundation of an action, unless it constitutes a legal injury; and what one man has a right to do, another can have no right to complain of. *Bellinger & Ralls v. Glenn, Brockway & Co., 190.*
2. *In an action on a promissory note by payee against maker*—A complaint in the form prescribed by the Code (Form No. 4, page 701) is sufficient to support a judgment by default. *Beggs & Son v. Arnotte, 179.*
3. *Action by trustee, without sanction of court.*—Although trustees, when officers of the Chancery Court, may not have the right to institute an action at law without first obtaining the sanction of the court; yet it may be doubted whether the defendant can interpose this objection in defense of the action, and it certainly can not be raised for the first time in the appellate court. *Smith v. Inge, 283.*
4. *Action by married woman on note payable to herself.*—In an action by a married woman in her own name, on a promissory note payable to herself, a plea averring that the note “was given for certain accounts transferred to plaintiff directly by her husband,” but not averring that the transfer was made during coverture, does not negative the fact that the note is held as part of her statutory estate, and is fatally defective. *Wofford v. Baker, 303.*

ACTION—*Continued.*

5. *Action consolidated by order of court.*—When several actions are pending at the same time, in the same court, and between the same parties, for alleged breaches of the same continuing or unrescinded contract, they may be consolidated (Code, § 3024) by order of the court. *Wilkinson v. Black*, 329.
6. *Election of remedies by discharged employee.*—When a servant, or other person employed, is discharged without legal cause, before the expiration of the stipulated term, he has an election of remedies; 1st, he may treat the contract as rescinded, and sue on a *quantum meruit* for work actually performed; 2d, he may sue for a breach of the contract, and recover damages for the breach up to the time of the trial; or 3d, he may wait until the expiration of the stipulated term of service, and sue for the agreed wages for the entire term. *Ib.* 329.
7. *When action brought for separate installments; when for entire term.* If the wages are payable in installments, monthly or otherwise, the plaintiff may bring a separate action for each installment as it falls due; but if the action is not brought until after the expiration of the entire term, or if the entire term expires before the trial, the measure of damages is, *prima facie*, the stipulated wages for the entire term. *Ib.* 329.
8. *When defendant may reduce amount of plaintiff's recovery.*—The defendant may, without regard to the form of action, reduce the amount of the plaintiff's recovery, by showing that, after his discharge, he obtained other employment, or might have obtained it by the exercise of reasonable diligence; but, though the plaintiff, suing on the contract, and claiming the entire wages for the term, is required to aver his readiness and willingness to perform, his right of recovery can not be defeated by showing that he engaged in other business during the residue of the term. (Overruling dictum in *Holloway v. Talbot*, 70 Ala. 392.) *Ib.* 329.
9. *Nature of employment plaintiff required to accept.*—The plaintiff is not required to accept an offer of other employment, unless it is of the same general nature as that from which he was discharged, and in the same neighborhood. *Ib.* 329.
10. *When action lies for money had and received.*—An action for money had and received is an equitable remedy, and lies whenever the defendant has received money which in good conscience belongs to the defendant; and neither privity of contract, nor an express promise to pay, is necessary to maintain it. *Boyett & Wimberly v. Potter*, 476.
11. *Same.*—When the name of a third person is inserted as mortgagee by mistake, caused by using a merchant's printed form without erasing his name, and the personal property conveyed afterwards comes into possession under a junior mortgage, and is sold by him, a person claiming by transfer and assignment from the first mortgagee may maintain an action against him for money had and received. *Ib.* 476.
12. *In what county action may be brought: who is householder.*—An unmarried man, who rents and occupies a room as a sleeping apartment, taking his meals elsewhere in the city or town, is not a householder in the meaning of the statute (Code, § 2928), which prohibits an action against a freeholder except in the county of his residence. *Katzenburg v. Lehman*, 512.
13. *When action lies generally; contributory negligence as defense.*—The statute which gives an action for damages to the personal representative of a deceased person, whose death was "caused by the wrongful act or omission of another," is limited to cases in which the deceased person himself, if death had not ensued, might have maintained an action for the omission (Code, § 2641),

ACTION—*Continued.*

and since contributory negligence on the part of the deceased would have been a complete defense to an action by him, it is equally a defense to an action by his personal representative. *King v. Henkie*, 505.

14. *Same*; retailer selling or giving liquor to intoxicated person, resulting in death.—Although a retailer of spirituous liquors, who sells or gives liquor to an intoxicated person, known to him to be a person of intemperate habits is guilty of a misdemeanor, (Code, § 4205); yet he is not liable to a statutory action at the suit of the personal representative, though death ensued immediately after the liquor was drank, since the act of selling or giving the liquor is not the immediate cause of the death; and if that act were within the purview of the statute, the contributory negligence of the decedent himself would be a defense to the action. *Ib.* 505.

ACTION FOR FALSE IMPRISONMENT.

15. *Arrest by town marshal for breach or attempted breach of peace; prisoner has no right to select officer before whom he will be tried.*—A person arrested by a town marshal, for a breach or attempted breach of the peace committed in his presence, has no right to select the officer before whom he will be tried, nor can he object to being brought to trial before the mayor or intendant of the town. *Hays v. Mitchell*, 183.
16. *Actual breach of the peace not necessary to justify arrest by marshal; may act on appearances, and arrest to prevent threatened breach.* In the performance of his duty to prevent threatened breaches of the peace, a town marshal, or other municipal police officer, may act on the reasonable appearance of things, and make arrests before an actual breach of the peace is committed; and he may justify on the ground of such reasonable apprehension of violence, when sued for the arrest. *Ib.* 183.
17. *Action; legal injury the basis of.*—An act can not be the foundation of an action, unless it constitutes a legal injury; and what one man has a right to do, another can have no right to complain of. *Bellinger & Ralls v. Glenn, B. & Co.*, 190.

ADVERSE POSSESSION.

See EJECTMENT, 3 (p. 304); See CHANCERY PLEADING & PRACTICE, 29 (p. 296).

1. (*Adverse possession perfects title*).—Uninterrupted possession by defendant and his vendor, for twenty-eight years before suit brought, under written claim of title, accompanied by the usual acts of ownership, "perfects a title against all the world, unless there be a claimant armed with a paramount title, yet so circumstanced that he could not assert his title until the occurrence of an event which has happened within less than ten years before the commencement of the suit." *McQueen v. Logan et al.*, 304.
2. *Permanent improvements, and liability for rents; adverse possession for three years, and possession under color of title.*—When the defendant is in possession under color of title, has had adverse possession for three years, and has erected permanent improvements (Code, §§ 2951-54, 2966), he may waive his claim for improvements, and restrict his liability for rents to one year next before the commencement of the suit; or he may claim the full value of his improvements, and waive his right to claim a restricted liability for rents; but he can not restrict his liability for rents, by pleading possession under color of title, and set off the value of the improvements erected against the rent for the limited period. *Dobbs v. Hairston*, 594.

AGENCY. (PROOF OF).

See HILL, FONTAINE & Co. v. HELTON, 528; DECLARATIONS OF AGENT, *Ib.* 528.

ALIMONY.

See CHANCERY II. PLEADING AND PRACTICE 1, (p. 97); See, also *Ib.* 16, (p. 225).

AMENDMENTS.

1. *Amended complaint; statute of limitations.*—When an amended count does not introduce a new cause of action, but merely varies the allegations as to the cause of action set out in the original complaint, the statute of limitations is not available as a defense, unless the bar was complete at the commencement of the suit; as where the original complaint claims damages on account of injuries sustained by plaintiff in falling from a platform at a railway station, by reason of the company's failure to provide a light, and an amended count describes the platform and steps with particularity, showing the necessity for a light on account of their dangerous condition. *Ala. G. S. Railroad Co. v. Arnold*, 600.

See PLEADING AND PRACTICE.

APPEAL.

See ERROR AND APPEAL.

ARBITRATION AND AWARD.

1. *Arbitration; submission to, at common law.*—At common law, a submission to arbitration was not required to be in writing; and such mode of arbitration is not affected by statutory provisions. *Ehrman v. Stanfield*, 118.
2. *Award of sum of money without fixing day of payment; how construed.*—When a sum of money is awarded in favor of one party against the other, and no day of payment is fixed, it is construed payable *instantly*; and not being paid on delivery of a copy, an action may be brought on the award. *Ib.* 118.
3. *Award; scope and conclusiveness of.*—The matter submitted to arbitration being "the disputed question of damages arising from an injunction sued out by one party against the other," if the submission includes the two questions of liability and amount of damages, the award is equally conclusive of both, unless impeached for good cause; if only the question of amount, the liability is conceded; and in either case, the papers in the injunction suit, being only relevant to the question of liability, are not competent evidence in an action on the award. *Ib.* 118.
4. *Same.*—If the penalty of the injunction bond be the limit of the arbitrators' authority in amount, and their award is in excess of that sum, it not being shown that any matter outside of the submission was considered by them, the award is not void *in toto*; but, the excess being remitted by plaintiff, he may have judgment for the residue. *Ib.* 118.
5. *Submission to arbitration by partner.*—One partner has no right, without the concurrence of his co-partner, or against their objection, to submit a pending suit to arbitration; and such submission by him, and an award rendered under it, are no defense to the action. (Overruling *Cochran v. Cunningham*, 16 Ala. 448.) *Fancher Bros. v. Bibb Furnace Company*, 481.

ARBITRATION AND AWARD—*Continued.*

6. *Award without order of court; no appeal from.*—An award made by arbitrators in a cause pending in the Circuit Court, without an order of said court, will not be entered as the judgment of the court; and an appeal from the action of the judge, in refusing to enter it as such, is unauthorized by the statute, and will not lie. *Bell v. Sampey*, 372.
7. *Mandamus refused on the authority of Ex parte Dudley*, 79 Ala. *Ex parte Bell*, 372.

See AWARD, 372.

ASSIGNMENT.

1. *General assignment; what constitutes.*—A mortgage given by a debtor to one of his creditors will be declared a general assignment at the instance of the others (Code, § 2126), if it conveys substantially all of his property that is subject to the satisfaction of his debts; but the burden of proof on this issue is on them. *Ordway & McGuire v. White Handley et al.*, 244.
2. *Same; evidence sufficient to entitle complainants to decree.*—The only evidence being that of the debtor himself, who testifies that, at the time the mortgage was executed, he owned no other land than his homestead, besides the tract conveyed by the mortgage, and that his personal property was not worth one thousand dollars, this is sufficient to entitle the complainants to a decree. *Ib.* 244.
3. *Same; mortgage operating as general assignment.*—A mortgage conveying substantially all of a debtor's property, though given to secure a debt contemporaneously contracted, was declared and enforced as a general assignment, enuring to the benefit of the creditors equally (Code, § 2126), prior to the amendment of that statute, which excepts them from its operation (Sess. Acts 1882-83, p. 189); and the amendatory law, not clearly appearing to have been intended to be retroactive in its operation, will not be construed to apply to mortgages executed prior to its enactment. *Warten v. Mathews*, 429.

ATTACHMENT.

1. *Attachment; when writ not necessary to be signed or certified by officer issuing it.*—If an affidavit for an attachment is in fact made before the officer who issues the writ, it is not necessary that it shall be signed or certified by him; and a plea in abatement, "because it was not signed by the clerk," presents an immaterial issue. *Hyde v. Adams*, 111.
2. *Attachment bond; when indorsement of approval by clerk not necessary.*—If an attachment bond is in fact approved by the clerk, filed, and the attachment issued on the faith of it, it is not necessary that his approval shall also be indorsed on it. *Ib.* 111.
3. *Remission by plaintiff in attachment of portion of his recovery; when claimant can not complain.*—The claimants of property attached can not complain of the action of the court in requiring the plaintiff to remit a portion of his recovery, as the only alternative to granting a new trial, since they can not possibly be injured by it. *Higginbotham v. Clayton & Webb*, 194.
4. *Title of purchaser at sheriff's sale under judgment in attachment relates back to levy of attachment.*—A purchaser at sheriff's sale, under a judgment in an attachment case, acquires a title which dates back to the levy of the attachment, and overrides an intermediate conveyance by the defendant. *Striplin & Co. v. Cooper & Son*, 256.

ATTACHMENT—*Continued.*

5. *Same (this case.)*—Where the owner of a homestead, having made an executory sale, in which his wife did not join, afterwards removed from the premises, and, an attachment was then levied on the land; a purchaser at the sheriff's sale, under the judgment in the attachment, sale, acquires a title which must prevail over that of an assignee of the title-bond, to whom a conveyance was executed after the levy of the attachment. *Ib.* 256.
6. *Sufficiency of affidavit.*—In an affidavit for an attachment, while it is not permissible to state two or more grounds in the alternative, or disjunctively, two or more grounds may be stated cumulatively, or conjunctively, when they are not inconsistent with each other. *Smith v. Baker*, 318.
7. *Same.*—That the defendant in attachment is about to dispose of his property fraudulently, that he has fraudulently disposed of a part of his property, and that he has money, property, and effects, liable to satisfy his debts, which he fraudulently withholds, are not inconsistent grounds for suing out the writ, and may be stated conjunctively in the affidavit. *Ib.* 318.
8. *Personal property levied and replevied not subject to subsequent levy.* It is settled law in this State that personal property levied on by attachment or execution, and replevied, is in the custody of the law, and is not subject to levy by junior attachment or execution; and if a second levy is made, it will be vacated, on motion, by the party in interest. *Powell v. Rankin & Co.*, 316.
9. *Measure of damages.*—In an action against a sheriff and his sureties, for levying an attachment against a third person on plaintiff's goods, there being no aggravating circumstances, the measure of damages is the value of the goods at the time they were taken, with interest to the day of the trial. *Ib.* 316.
10. *Transfer of goods after levy.*—If the goods belonged to the plaintiff, and were in his possession at the time the attachment was levied on them, his subsequent sale of them to a third person does not affect his right of action for the wrongful act. *Ib.* 316

BAILOR AND BAILEE.

1. *Relation of bailor and bailee.*—If the goods are delivered by the person so wrongfully receiving them to another carrier, on whom he afterwards gives plaintiff an order for them, and this carrier, accepting the order, and receiving the charges for freight, agrees to deliver them to plaintiff on demand; this creates between them the relation of bailor and bailee. *Young v. E. Ala. R'way Co.* 100.
2. *Bailee can not set up title in third person, but may deliver to rightful owner.*—As a general rule, the bailee can not set up the title of a third person, in defense of an action by his bailor; but, if the bailor in fact had no valid title, the bailee may deliver the goods to the rightful owner on demand, or hold them subject to his order on notice and demand, the *onus* of proving that defense resting on him. *Young v. E. Ala. R'way Co.* 100.
3. *Lien of bailee, and liability for negligence.*—The proprietor of a gin-
nery has a lien on cotton delivered to him to be ginned, for his services in ginning it, and is entitled to retain the possession until his charges are paid, but, if his lien has been discharged, and the property is not forthcoming on demand, the *onus* is on him to prove that it perished, was destroyed, lost or stolen, although he had exercised ordinary diligence in preserving it; and his liability extends equally to the acts of his agent in charge, or of a subsequent lessee of the gin-
nery. *Toney v. Spragins*, 541.

BANKRUPTCY.

2. *Limitation of suit by assignee in bankruptcy; fraudulent concealment.*—When an assignee in bankruptcy files a bill (or cross-bill) in equity, for the purpose of enforcing a right or claim which had accrued more than two years previously, a general averment of fraudulent concealment is not sufficient to avoid the statutory bar (U. S. Rev. Stat., § 5057): he must aver the facts constituting such fraudulent concealment, and show how or when he first came to a knowledge of the facts which put him on inquiry. *Toney v. Spragins*, 541.

BILL OF EXCEPTIONS.

1. *Documents not identified as parts of the bill of exceptions not considered.*—Written documents copied into the transcript can not be considered by this court for any purpose, unless so described and identified as to become a part of the bill of exceptions. *Stapp v. Wilkinson*, 47.
2. *Bill of exceptions; agreement of counsel can not operate as.*—An agreement of counsel can not operate as a substitute for a bill of exceptions. *Clark v. McCrary*, 110.
3. *Same; when court can not revise charge or judgment in absence of.* The cause being submitted to the court on an agreed statement of facts, in which it is stipulated that the court shall, on the admitted facts, give a general charge in favor of either party, and render judgment as on verdict; that the party against whom he decides shall have an exception to the charge, and may prosecute an appeal; this court can not revise the charge or judgment, in the absence of a bill of exceptions properly signed. *Ib.* 110.
4. *Bills of exceptions; signed after adjournment of term.*—A presiding judge has no authority to sign a bill of exceptions after the adjournment of the court for the term at which the exceptions were taken, except by the written agreement of counsel. *Loosse v. Vogel*, 308.
5. *Rule for computing time in which act to be done.*—The rule for computing the time within which an act is stipulated to be done, is to exclude the first day and include the last. An agreement that a bill of exceptions might be signed within sixty days after the adjournment of court, adjournment being on May 2d, the sixty days expired on the 1st of July following. *Ib.* 308.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Same.*—The drawees of a bill of exchange can not maintain an action against the holder, for having the bill protested after waiver of protest by the drawer and indorsers. *Bellinger & Ralls v. Glenn, Brockway & Co.*, 190.
2. *Waiver of protest; holder may protest notwithstanding.*—Notwithstanding a waiver of protest, the holder of a bill of exchange may have it protested, if he desires to claim the statutory damages for non-acceptance or non-payment. *Ib.* 190.
3. *Negotiable paper; when holder entitled to protection.*—When the consideration of a note is the sale and assignment of a patent right, and the payee obtains the possession by fraud without making the assignment, the fraud is available as a defense to the maker, as against the payee, or in the hands of a transferee if the note is not negotiable; but, if the note is negotiable, and is transferred before maturity, for valuable consideration, and in the usual course of business, the holder is entitled to protection. *Wildsmith v. Tracy*, 259.

BILLS OF EXCHANGE AND PROMISSORY NOTES—*Continued.*

4. *Same ; duty of purchaser for valuable consideration, before maturity.*—The purchaser of a negotiable note, before maturity, and for valuable consideration, is not bound to inquire of the maker whether there is any defect in it, or defense against it; but is entitled to protection, unless there was bad faith in his purchase or such gross negligence as is evidence of bad faith; and his purchase for value before maturity being shown, the *onus* of proving notice is on the maker. *Ib.* 259.
5. *Discount of promissory note made for accommodation of payee ; when usurious.*—When a promissory note is made for the accommodation of the payee, and is discounted for him at more than legal interest, it is usurious in the hands of the purchaser; but the principle does not apply to the purchase of a negotiable note before maturity, which was given in consideration of the sale and assignment of a patent, although the possession was obtained by fraud on the part of the payee, and without making the assignment. *Ib.* 259.
6. *Assignment of note secured by mortgage carries with it the mortgage security*—An assignment of a note secured by mortgage, carries with it the mortgage security, and authorizes the assignee to execute the power of sale therein contained. *Ib.* 259.
7. *Waiver of protest ; holder may protest notwithstanding.*—Notwithstanding a waiver of protest, the holder of a bill of exchange may have it protested, if he desires to claim the statutory damages for non-acceptance or non-payment. *Bellinger & Ralls v. Glenn, B. & Co.,* 190.
8. *Same.*—The drawees of a bill of exchange can not maintain an action against the holder, for having the bill protested after waiver of protest by the drawer and indorsers. *Ib.* 190.
9. *Proof of loss of note.*—In an action on a promissory note, secondary evidence of its contents may be received, on the testimony of the plaintiff that he had not seen it since it was used, in a former chancery suit, proof of search by his solicitor in that suit among his papers, and by the register in chancery of search among the papers on file in his office. *Katzenberg v. Lehman,* 512.

BONDS.

1. *Official bond of tax-collector ; subrogation of surety to rights of State or county against property of principal.*—A surety on the official bond of a defaulting tax-collector, paying the amount of his principal's default, is entitled, on general equitable principles, to be subrogated to the rights of the State or county, and to have the statutory lien created by the bond enforced for his indemnity, against his principal, co-sureties, and purchasers with notice; and if he pays a judgment rendered against his principal and co-sureties, taking an assignment of it to himself, the statute (Code, § 3418) gives him the right to assert, "in law or equity, any lien or right against the principal debtor which the plaintiff could assert if the debt had not been paid." *Schuessler v. Dudley,* 547.

CERTIORARI.

1. *Function of the writ of certiorari.*—Its office is to correct errors of law apparent on the record. Where a new jurisdiction is created, and the course of proceeding thereunder is different from the common law, and no provision is made for reviewing the action of the judge, *certiorari* is the proper remedy. *Miller v. Jones,* 89.
2. *Judgment of Court of County Commissioners increasing valuation of property.*—The judgment of the Court of County Commissioners

CERTIORARI—*Continued.*

increasing the valuation of property as assessed for taxation, is a separate and distinct judgment as to each tax payer; and *certiorari* will not be awarded to bring up for review jointly, judgments involving different rights. *Carter v. Court Co. Com.*, 394.

3. See *Crowder v. Fletcher & Co.* 219.

4. *Certiorari* proper remedy when no mode of review provided; judgment to be rendered.—No mode of review having been specifically provided, *certiorari* is the proper remedy to review the questions of jurisdiction and the regularity of proceedings in the Court of County Revenue; and a judgment quashing or affirming the proceedings, is the only judgment which can be rendered on review. *Stanfill v. Court of Co. Rev. Dallas*, 287.

CHANCERY.

I. JURISDICTION AND GENERAL PRINCIPLES.

1. *An administrator purchasing a decree against his estate,—when enures to the benefit of estate; when entitled to credit.*—If an administrator purchase a decree which is a debt or charge against the estate, at less than the amount due on it, the benefit of the purchase enures to the estate, but he is entitled to be reimbursed the amount of his private funds used in making the purchase. *Powell et al. v. Powell*, 11.
2. *When heirs have a right to claim the benefit of a purchase of the estate lands by the administrator.*—The decree having been rendered under a bill foreclosing a vendor's lien on land, and the administrator becoming the purchaser of the land at the sale under the decree, prior to his purchase of the decree; the right of the heirs to claim the benefit of the latter purchase, as being made for the estate, is independent of their right of election to claim the benefit of the former. *Ib.* 11.
3. *When heirs may elect to claim profit arising from resale—when administrator entitled to be repaid.*—The land having been resold by the administrator at a profit, the heirs may, at their election, claim the profit arising from the resale; but, if they so elect, the administrator is entitled to be repaid the purchase-money expended by him, and also to the rents and profits accruing up to the resale. *Ib.* 11.
4. *Election must be in unambiguous terms.*—Such election, to be effective, must be clearly manifested, and declared in unambiguous terms; and in a bill which seeks to bring the administrator to a settlement, if the heirs desire to claim the profits of resale, they must distinctly aver their election, and the facts on which it is based, or assert their claim before the register, before entering on a statement of the account. *Ib.* 11.
5. *Whether conveyance absolute on its face is a mortgage; what necessary to be shown.*—When the contestation is whether a conveyance, absolute on its face, was in fact intended as a mortgage, the party so asserting must show, by clear and convincing evidence, that such was the intention and understanding of both parties; but, where the contestation is whether the transaction was intended as a mortgage or as a conditional sale, with a reservation of the right to repurchase, the same stringency of proof is not required; and if the intention is in doubt, the court inclines to hold it a mortgage. *Mitchell v. Wellman*, 16.
6. *Absolute conveyance, with stipulation to repurchase.*—In this case, the conveyance being absolute in form, with a stipulation in a separate paper of the right to repurchase by a specified day; and the evidence showing that the transaction did not originate in a

CHANCERY—*Continued.*

- proposition for a loan, and that no debt existed or continued between the parties; the court declines to treat the transaction as a mortgage. *Ib.* 16.
7. *Relieving minors of disability; impeaching equity decree.*—In relieving minors of the disability of infancy (Code, §§ 2435–41) the Chancery Court exercises a special and limited jurisdiction, and its decrees stand on the same footing as the judgments of courts of limited and inferior jurisdiction, whose recitals of notice or appearance may be impeached and contradicted, in a collateral proceeding, by extrinsic evidence. *Cox v. Johnson et al.*, 22.
 8. *Same; requisites of petition.*—When the infant has a guardian, the petition asking to be relieved of the disabilities of non-age must be signed by the infant in person, and the guardian must join in the petition; and if signed by the guardian, in the name of the infant, but without his knowledge or consent, the decree founded on it is a fraud on the jurisdiction of the court, which the court will set aside on a direct proceeding, or, without setting it aside will prevent the guardian using it against the infant. *Ib.* 22.
 9. *Guardian's settlement; requisite proceedings.*—A settlement of the guardian's accounts in the Probate Court, made during the minority of the ward, before the resignation of the guardian, and without the appointment of a guardian *ad litem*, is void for want of jurisdiction; and a decree in chancery removing the ward's disabilities as an infant, fraudulently procured by the guardian, imparts no validity to the settlement. *Ib.* 22.
 10. *Ward suing guardian after attaining majority to avoid settlements made.*—A bill in equity filed by a ward within twelve months after attaining majority, seeking to compel a settlement of the accounts of his guardian, and to set aside conveyances executed by him to his guardian during his minority, based on a void settlement rendered by the Probate Court, is neither multifarious, nor wanting in equity. *Ib.* 22.
 11. *Right of widow before assignment of dower.*—The widow has no legal estate or interest in the lands of the deceased husband until a specific part of the land is allotted and set apart for her dower estate; her interest, until then, being equitable, in its nature a right lying in action. *Reeves v. Brooks*, 26.
 12. *Assignability of widow's dower interest before allotment at law.*—The right of dower not being a legal estate, before assignment, is not, in law, the subject of conveyance to a stranger. Notwithstanding such conveyance the heir may successfully maintain ejectment against the grantee for the recovery of possession. *Ib.* 26.
 13. *Same; in equity.*—In equity the interest of the assignee is protected, and he is treated as succeeding to the right of the assignor, and as the owner of the thing transferred. The assignment of the widow's right of the dower, before allotment, though inoperative at law, is effective in a court of equity, that will, in a proper case, enforce her transfer, and protect the rights of her transferee. *Ib.* 26.
 14. *Estoppel of widow by joining in deed with heirs.*—Where the widow unites with the heirs in a warranty deed conveying all the right, estate and interest of the grantors, and reciting that the consideration was paid to all of them, the equitable estate of the widow is merged in the legal estate conveyed by the heirs; and she will not be heard to gainsay the title of the grantees by asserting a claim to either dower or homestead. *Ib.* 26.
 15. *Right of widow to rents during quarantine.*—Under the statute, § 2238, Code, the widow may retain possession of the dwelling and the plantation connected therewith, until the assignment of her

CHANCERY—*Continued.*

- dower. During such time she may rent the premises; and, if the administrator, heir or other person, receives the rent, she may recover it from him. *Ib.* 26.
16. *Breaches must be alleged in complaint.*—The plaintiff having agreed and undertaken, for a specified price, to unload for defendant certain cars laden with lime rock "at such times and places as may be ordered by defendant," an action does not lie to recover the stipulated compensation, unless the service was ordered or directed by defendant, or was performed by his authority, express or implied; and the fact that it was so done must be alleged in the complaint. *Flouss & Kennedy v. The Eureka Co.*, 30.
 17. *Bill filed with double aspect.*—If the bill alleges that the transaction was a mortgage, the complainant can obtain no relief founded on a conditional sale. *Douglass v. Moody et al.*, 61.
 18. *The power to appoint receivers in vacation.*—Can only be exercised in a pending suit. The filing of the bill is the commencement of the suit. *Harwell et al. v. Potts et al.*, 70.
 19. *Appointment of receiver; when void.*—The appointment of a receiver in vacation, before the filing of the bill, is without jurisdiction, and void. *Ib.* 70.
 20. *Same.*—The subsequent filing of the bill, and giving of the requisite bond by the receiver, can not impart validity to the void act of his appointment before bill filed. *Ib.* 70.
 21. *Pledge as collateral security; limitation of right to redeem.*—By an ancient rule of law, as laid down in the old text-books and adjudged cases, if no time was fixed by the parties themselves for the redemption of a pledge, the pledgor was allowed his life-time within which to redeem, unless quickened by notice, or through the intervention of a court of equity; but the more modern, and the better rule, by analogy to that which applies to the redemption of mortgages, exacts of him the exercise of reasonable diligence, at the risk of being barred of all relief on account of the staleness of the demand. *Gilmer v. Morris*, 78.
 22. *Same; staleness of demand.*—In the application of the doctrine of staleness, a defense peculiar to courts of equity, the tendency of modern decisions is to shorten the period allowed for the assertion of equitable rights, though each case is somewhat dependent upon its own peculiar facts and circumstances; and where the pledgor of stocks seeks, by his bill to redeem, to make profit out of an unexpected rise, a shorter period is allowed, than where he seeks to make the pledgee account only for a surplus received on an ordinary sale. *Ib.* 78.
 23. *Same; case at bar.*—In this case, the alleged pledge of stock in a private land company was made in 1871; the pledgee advanced money, from time to time, on the faith of it, "carrying it" for the pledgor during a series of years, while its value was fluctuating, sometimes worth only twenty cents on the dollar, and never more than the amount advanced on it; and he finally sold it 1881, when it approximated par value, for less than the amount advanced on it up to that time. *Held*, That a bill filed in 1884, and seeking to hold the pledgee accountable for the value as rapidly appreciated after the sale, until it was worth twenty for one, was properly dismissed, on account of the staleness of the demand. *Ib.* 78.
 24. *Court of equity will enforce assessments when directors fail to perform that duty.*—If the directors of a private corporation, having authority to call in unpaid subscriptions of stock, fail to make the assessments and collections necessary to meet the demands of creditors, a court of equity will take jurisdiction, at the in-

CHANCERY—*Continued.*

- stance of creditors, and enforce the necessary assessments. *Glenn v. Semple*, 159.
25. *Bill to set aside fraudulent conveyance; when not multifarious.* Under the rule against multifariousness, several distinct matters wholly unconnected, or several defendants against whom the complainant asserts separate demands, the case of each defendant being entirely distinct in its subject-matter from that of the others, can not be joined in the same bill; but, in the application of this rule to particular cases, the court necessarily exercises a discretion, endeavoring to avoid a multiplicity of suits, on the one hand, and not to involve a party in oppressive and expensive litigation in which he has no interest, on the other. *Burford, adm'r, v. Steele*, 147.
 26. *Fraud; when averment of, sufficient.*—While a general charge of fraud, without a statement of the facts on which it is founded, is not sufficient, it is not necessary that all the facts and circumstances shall be minutely alleged; a general averment of facts from which, unexplained, the conclusion of fraud arises, is sufficient. *Ib.* 147.
 27. *Averment of facts; when not multifarious.*—The averment of facts as to a distinct matter, as to which no relief is prayed, does not make a bill multifarious. *Ib.* 147.
 28. *Motion to amend answer after hearing decision on the merits; when properly refused.*—After a hearing and decision on the merits in a chancery cause, a motion to amend the answer, by incorporating a demurrer to the bill on account of a technical defect which is amendable, and which exerted no influence in the decision of the case, is properly refused. *Eureka Co. v. Edwards*, 250.
 29. *Motion to take further testimony; when properly overruled.*—A motion to take further testimony as to an important issue of fact, merely cumulative to the testimony already taken, and to be used on an application for a rehearing, is properly overruled. *Ib.* 250.
 30. *Court of equity will enforce assessments when directors fail to perform that duty.*—If the directors of a private corporation, having authority to call in unpaid subscriptions of stock, fail to make the assessments and collections necessary to meet the demands of creditors, a court of equity will take jurisdiction, at the instance of creditors, and enforce the necessary assessments. *Glenn, trustee, v. Semple*, 159.
 31. *Decree of insolvency; when not conclusive on heirs and distributees.* A decree of the Probate Court declaring an estate insolvent, and subsequent proceedings based on that decree, rendered and had prior to the enactment of the statute approved December 4, 1878, (Sess. Acts, 1878-9, p. 69), are not conclusive on the heirs and distributees, legatees and devisees, who were not parties, and had no right to file objections to claims, nor to contest the administrator's accounts. *McMillan v. Rushing*, 402.
 32. *Account; bill for, by legatees and devisees against administrator of estate declared and settled as insolvent; when necessary to be shown.* To sustain a bill by legatees and devisees, against the administrator of an estate which has been declared and settled as insolvent, for an account of property specially devised and bequeathed to them, they must show that, on a proper accounting, after paying all the debts properly filed against the insolvent estate, assets will remain to which they are entitled. *Ib.* 402.
 33. *Administrator without interest can not purchase at his own sale.* When an administrator has no interest in the estate which he represents, he can not become, either by himself, or jointly with another person, the purchaser of lands sold by himself under a

CHANCERY—*Continued.*

probate decree, but such sale is voidable at the election of the heirs or devisees seasonably expressed; and the confirmation of the sale by the Probate Court does not prevent the application of the equitable doctrine. *Ib.* 402.

34. *Laches not imputed to infant; when election seasonably expressed.* As a general rule, *laches* will not be imputed to an infant; and where several children, seeking to set aside a purchase of lands by an administrator at his own sale, file their bill within two years after the eldest had attained his majority, their election is seasonably expressed. *Ib.* 402.
35. *Who not purchasers for valuable consideration.*—Neither a voluntary donee, nor a grantee by quit claim only, is entitled to protection as a purchaser for valuable consideration; and a purchaser at a sale made by an administrator stands in no better condition. *Ib.* 402.
36. *When not necessary to set aside order of sale.*—In setting aside a sale under a probate decree, where the administrator himself became the purchaser, it is not necessary or proper to set aside the order of sale, if regular; but the court may, if necessary, direct a new sale under it. *Ib.* 402.

II. PLEADING AND PRACTICE.

1. *Chancellor's conclusion in this case affirmed, there being no decided preponderance of evidence against correctness of.*—On consideration of the evidence in this record, the court can not affirm that there is a decided preponderance against the correctness of the chancellor's conclusion, and therefore affirms his decree refusing to grant a divorce to the complainant.—*Edwards v. Edwards*, 97.
2. *Alimony; pending suit for divorce; pending appeal to this court.* Pending a suit for divorce, the wife is entitled, as of right, to an allowance for temporary alimony pending an appeal to this court, being subsequent to the appeal, is not subject to revision by this court on the appeal.—*Ib.* 97.
3. *Bill seeking sale of decedent's lands for payment of debts; proof as against infant defendants.*—When a bill seeks to sell a decedent's lands for the payment of debts, because of the insufficiency of personal assets, the existence of the debts and the deficiency of personal assets must be proved, as against infant defendants, by other evidence than the admissions of their guardian *ad litem*. *Hooper v. Hardie*, 114.
4. *Decree based on admissions of guardian ad litem; when infants may file bill of review.*—If the record shows that the decree was founded only on the admissions of the guardian *ad litem* of the infants, they may file a bill of review within three years after attaining their majority; and the proceedings will be reversed back to the pleadings, in order that a hearing may be had on legal evidence. *Ib.* 114.
5. *Partition; sale of lands for.*—It is well settled by the course of decisions in this State, that a court of equity is without jurisdiction to decree, for partition, the sale of land belonging to adult tenants, without their consent.—*Johnson v. Kelly, et al*, 135.
6. *Decree pro confesso; effect of.*—A decree *pro confesso* is an admission only of the allegations of the bill which are well pleaded; but, while such decree is an admission of the facts alleged, it is not an admission that the complainant is entitled to equitable relief, unless authorized by the allegations of the bill.—*Ib.* 135.
7. *Chancellor may entertain motion to set aside sale of lands, under execution issued on decree, while appeal pending in this court.*—Pending an appeal in this court, from a decree rendered in a

CHANCERY—*Continued.*

- chancery case, the chancellor has no power or jurisdiction to render any further decree affecting the rights and equities of the parties; but, having the power, common to courts of law and equity, to prevent the abuse of its process, he may entertain a motion to set aside a sale of land under execution issued on the decree.—*Allen v. Allen*, 154.
8. *Same.*—An appeal lies from a decree dismissing such motion. *Ib.* 154.
 9. *System of executing decrees of Chancery Court assimilated to that of Circuit Court.*—By statutory provision (Code, § 3906), the whole system of executing the decrees of the Chancery Court is assimilated, as far as practicable, to that prevailing in the Circuit, and like writs of execution are allowed in each court in like cases. *Ib.* 154.
 10. *Execution against executor or administrator in representative character; when may issue against him individually.*—After the issue of an execution against an executor or administrator in his representative character, and its return “no property found” on a decree in the Chancery Court, as on a judgment at law, an execution may be issued against him individually; nor is it necessary that another execution, to be levied *de bonis testatoris* should be sent to the county in which he was appointed.—*Ib.* 154.
 11. *Demurrable defects in petition not available to appellant unless specified in demurrer.*—In a petition asking to set aside a sale of lands under execution, an averment that the land “was sold for a grossly inadequate price,” if objectionable as the averment of a legal conclusion, is amendable; and the defect not being specified in the demurrer, nor called to the attention of the chancellor, is not available in this court.—*Ib.* 154.
 12. *Bill in the alternative.*—A bill can not ask, in the alternative, either to set aside a probate decree on the ground of fraud, or to correct alleged errors of law and fact in it.—*Watts v. Frazer*, 186.
 13. *Relief in equity against judgment at law, or decree of Probate Court, on the ground of fraud.*—To justify relief in equity against a judgment at law, or decree of the Probate Court, on the ground of fraud, the alleged fraud must have been practiced in the rendition or procurement of the judgment, and it is not sufficient to show fraud in antecedent transactions, which would have constituted a good defense against the judgment.—*Ib.* 186.
 14. *Bill seeking to correct errors of law and fact in probate decree; when presumption can not be indulged against regularity of decree.*—When the bill seeks to correct errors of law and fact in a probate decree, rendered on the settlement of an administrator’s accounts, which is not set out, nor any errors or defects specified, but which is designated as “what purports to be a final settlement,” no presumption can be indulged against the regularity of the decree; and the general averment that there had never been any final settlement, in the absence of facts supporting the averment, is not sufficient, being the mere statement of a legal conclusion.—*Ib.* 186.
 15. *Judgment or decree against minor represented by guardian ad litem.* A minor, when represented by a guardian *ad litem*, is as much bound by a judgment or decree as an adult; and an averment of the complainant’s infancy at the rendition of a decree on the settlement of an administrator’s accounts, without an additional averment that he was not represented by guardian *ad litem*, shows no equitable ground for relief against it.—*Ib.* 186.
 16. *Bill dismissed on demurrer in term time.*—When a bill is dismissed on demurrer in term time, the complainant must ask leave to amend, if he desires to do so.—*East v. East*, 199.

CHANCERY—Continued.

17. *Alimony; jurisdiction of courts of equity in granting.*—Courts of equity have jurisdiction to grant alimony to a married woman, in the nature of maintenance, not merely as incidental to a bill for divorce, but on the original and independent ground that legal remedies are inadequate to enforce the duty of maintenance on the part of the husband.—*Hinds v. Hinds*, 225.
18. *Same; bill for; when fraudulent grantees of husband may be joined as defendants.*—Fraudulent grantees, to whom the husband has transferred his property in fraud of the complainant's right of maintenance, may be joined with him as defendants to such a bill; and the bill is not multifarious because they claim under several conveyances executed with the same common intent. *Ib.* 225.
19. *Bill in equity against married woman relieved of disabilities of coverture; when husband not necessary party; when bill not multifarious.*—When a bill seeks to enforce against a married woman, who has been relieved of the disabilities of coverture, the specific performance of a contract for the sale of land, and joins as a defendant another married woman, also relieved of the disabilities of coverture, on an allegation that the former had subsequently sold the same land to her, the husband of neither defendant is a necessary or proper party; and if the bill also seeks the settlement of a partnership between the complainant and the husband of the second defendant in carrying on a mill business on the land, as to which the husband only is a proper party defendant, it is multifarious. *Bayzor v. Adams*, 239.
20. *Divorce; actual or apprehended violence as ground of.*—The wife is entitled to divorce when the husband has committed actual violence on her person, attended with danger to life or health, or when, from his conduct, there is reasonable apprehension of such violence. (Code, § 2687). But, to bring a case within this statute, actual violence, or a reasonable apprehension thereof, must be shown; and insulting words, offensive manners, want of civil attention, or other conduct which shocks the sensibilities, wounds the feelings, and causes grief and domestic unhappiness, is not sufficient. *Wood v. Wood*, 254.
21. *Amendment of original bill; notice to defendant.*—A defendant who is in default, and against whom a decree *pro confesso* has been entered on the original bill, is nevertheless entitled to notice of a material amendment, alleging additional facts, and praying additional relief. *McClenny v. Ward*, 243.
22. *When summons properly served on wife.*—When husband and wife are joined as defendants to a bill, the summons for the wife is properly served, not on her personally, but on the husband for her (Rule of Ch. Pr., No. 22), unless the suit relates to her separate estate, or unless they are living apart; and the presumption will be indulged, when the contrary is not affirmatively shown, that they are living together. *Gladden v. The Am. Mort. Co.*, 270.
23. *Decree pro confesso not amendable on chancellor's bench notes, nunc pro tunc.*—A decree *pro confesso*, in regular form against husband and wife, can not be amended *nunc pro tunc*, so as to omit the name of the wife, on proof of the chancellor's "bench notes" ordering a decree against the husband, but not naming the wife. *Ib.* 270.
24. *Mortgaged lands decreed to be sold; when reference to register not necessary.*—In decreeing the foreclosure of a mortgage, it is not necessary to first order a reference to the register to report how much and what part of the mortgaged lands shall be sold; it is sufficient if the decree directs the register to sell only so much as

CHANCERY—*Continued.*

- may be necessary to satisfy the decree, and such part as can be sold with least injury to the defendant. *Ib.* 270.
25. *Subrogation of creditor to right of security given by surety to his principal.*—A mortgage executed by a principal debtor to indemnify his surety, creates a trust fund for the payment of the debt, to the benefit of which the creditor is entitled, by way of subrogation. *Smith v. Gillam*, 296.
 26. *Bar of Mortgage debt does not affect specific lien of mortgage.*—The failure of the mortgagee to present his claim for the mortgage debt, within the time prescribed by the statute of non-claim, does not affect his specific lien in, or title to the property. *Ib.* 296.
 27. *Claim of title distinguished from mere claim against estate.*—Claims of title, whether legal or equitable, do not come within the statute of non-claim, and can not in any just sense be said to be claims against the "estate" of the deceased, but assertions that the property claimed does not belong to the estate. *Ib.* 296.
 28. *Same; Watson v. Rose's Ex'rs* (51 Ala.) *overruled.*—There is no distinction in the principle, whether the mortgage or other lien is held by the creditor himself, or by a surety. The contrary doctrine asserted in *Watson v. Rose's Ex'rs*, 51 Ala. 292, is wrong, and that case is expressly overruled. *Ib.* 296.
 29. *Discharge of principal by operation of law not discharge of surety.* The discharge of a principal by operation of law, as in case of bankruptcy, insolvency, or of non-claim, does not operate to discharge a surety who is liable for a debt. *Ib.* 296.
 30. *Adverse possession.*—The rule on the subject of adverse possession by the alienee of a mortgagor is correctly and clearly stated in the case of *The State v. Conner*, 69 Ala 212. *Ib.* 296.
 31. *Title barred—trustee—cestui que trust.*—When the title of the trustee is barred, so also is that of the *cestui que trust*. *Ib.* 296.
 32. *No execution can issue on decree foreclosing mortgage, until after sale of mortgaged property, and balance ascertained.*—By statutory provision (Code, § 3908), when an account is taken under a bill in chancery, and the amount of indebtedness between the parties ascertained by the decree of the court, the decree has the force and effect of the judgment, and execution may at once issue on it; but, on decree for the foreclosure of mortgages, or the enforcement of equitable liens, "no execution must issue until the property ordered to sale shall have been sold, and the sale confirmed, and the balance due ascertained by the decree of the court." *Presley, Adm'x, v. McLean*, 309.
 33. *The statute contemplates two decrees, the second to be invoked by complainant, and not by the court ex mero motu.*—The statute contemplates a continuous proceeding, and a second decree after the sale, based upon the first, and ascertaining the balance due; which second decree must be invoked by the action of the complainant, and is not granted by the court *ex mero motu*. *Ib.* 309.
 34. *Scire facias; when not granted.*—After the lapse of eight years from the sale and its confirmation, during which period no action is had or asked in the cause, the suit is at an end, and the decree can neither be revived by *scire facias*, nor made the basis for a second decree, ascertaining the balance due, on which execution may issue. *Ib.* 309.
 35. *Bill to enforce vendor's lien, when conveyance has not been executed.* In a bill to enforce a vendor's lien, when no conveyance has been executed to the purchaser, and the payment of the purchase-money is to be contemporaneous with the execution of a conveyance, the complainant must allege that he is ready, willing and able to execute a good and sufficient deed; and if it appears that

CHANCERY—*Continued.*

- an adversary suit for the land is then pending and undetermined, the bill is prematurely filed. *Linn v. McLean*, 360.
36. *Bill in nature of specific performance ; inquiry as to title.*—Though the vendor's bill, in such case, can not be maintained strictly and solely for the purpose of enforcing his lien on the land, it may be maintained as in the nature of a bill for specific performance, under which it is sufficient that he is able to make a good title at any time before final decree; and in granting specific performance, and compelling the purchaser to accept a conveyance, the court may hold the land bound for the purchase-money, and order a sale on default of payment within a reasonable time; yet, the sufficiency of the title being denied, and not being conclusively established by a single judgment against the adverse claimant (Code, § 2969), an inquiry into the title should be first ordered and made, and the court should be satisfied as to its sufficiency. *Ib.* 360.
37. *Appeal from interlocutory decree sustaining demurrer to cross-bill ; when does not lie*—An appeal does not lie from an interlocutory decree sustaining a demurrer to a *cross-bill*, without an order dismissing it; and such appeal will be dismissed by the court *ex mero motu*, notwithstanding a joinder in error. (Overruling *Brooks v. Woods*, 40 Ala. 537). *Barclay v. Spraggins*, 357.
38. *Bill for partition by tenant for life ; parties to.*—A tenant for life may maintain a bill in equity for the partition of lands, and it is the better practice to make all the persons having an interest, tenants for life and remaindermen, parties to the suit. *Gayle v. Johnson*. 395.
39. *Remainderman necessary party.*—If a remainderman is not made a party to the suit, his rights are not affected by any decree that may be rendered; and if an infant remainderman is made a party, but is not properly brought before the court, the decree will be reversed on error, no matter how the question is presented. *Ib.* 395.
40. *Minors ; how brought before the court*—When the complainant is the father of an infant defendant, whose mother is dead, service of process should be made on her general guardian, if she has any; and if process is served on the person who is averred to be her guardian, but the bill is not sworn to, and there is no affidavit of the fact that he is such guardian, and no proof of the fact, the infant is not properly before the court. *Ib.* 395.
41. *Appearance ; record must show throughout.*—Where the defendants who have answered are actually present in court, either in person or by their solicitors or guardians *ad litem*, at the allowance of an amendment, they shall be deemed to have notice thereof; but the entries of record, made at the time, must show their presence, and when they do not, a recital in a subsequent decree *pro confesso*, taken before the register, is not sufficient. *Ib.* 395.

CHARGE TO JURY.

1. *General charge ; when this court will presume the giving of, justified by the evidence.*—When the bill of exceptions states that the "plaintiff introduced his verified account, and, this being all the evidence," the court gave a general charge in his favor; this court will presume, in the absence of anything to the contrary in the record, that the evidence justified the charge. *Hyde v. Adams*, 111.
2. *Attempted fraud in procuring testimony ; when properly considered to disadvantage of party attempting same.*—If a party attempts to practice a fraud on the court, by procuring, or assisting to pro-

CHARGE TO JURY—*Continued.*

- cure, testimony which he knows to be false, this is a circumstance which the jury may properly consider to his disadvantage; but, to justify a charge invoking this principle, there must be evidence tending to show such procurement of false testimony, and mere conflict of testimony as to some of the facts of the case is insufficient (*Beck v. State*, ante, p. 1). *State v. Vance*, 356.
3. *Abstract charge; when reversal worked by.*—An abstract charge, even though it assert a correct legal proposition, will work a reversal if it probably misled the jury. *Ib.* 356.
 4. *General charge on evidence; when properly refused.*—A general charge on the evidence, in favor of either party, is properly refused, when there is any conflict in the evidence as to a material fact, or evidence from which the jury might draw an inference adverse to him. *Tait v. Murphy*, 440.
 5. *Invasion of province of the jury.*—A charge which, on the facts hypothetically stated, withdraws from the jury the consideration of material inferences which they might have drawn, is an invasion of their province. *Dunlap & Steele v. Vandegrift*, 424.
 6. *Charges asked; right of party to examine.*—A party has the right to read and examine written charges requested by the adversary party, since an examination may be necessary to enable him to determine his own action in reference to them. *Ala. G. S. R. R. Co. v. Arnold*, 600.
 7. *Reading charges to jury.*—When charges asked are given, and so marked by the presiding judge, it is a legal right of the party to read, or have them read aloud to the jury. *Ib.* 600.

CODE.

1. §§ 2863-76. Salvage proceedings—property adrift.
2. § 3908. Execution issuing on chancery decree. *Presley, adm'r, v. McLean*, 309.
3. §§ 3916-18, 3921-2. Appeal from interlocutory appeal. *Clark v. Spencer*, 345.
4. § 3757. Construed. *Bergan v. Jeffries*, 349.
5. *Act adopting the Code; effect of subsequent act incorporated therein.* By the act adopting the Code of 1876, which was approved February 2d, 1877, it was provided, that "no act of the General Assembly passed at the present session shall be repealed or otherwise affected by" its adoption; and by force of this provision, an act passed subsequent to the adoption of the Code, and therein incorporated by the codifiers; repeals by implication any other provisions relating to the same subject with which it is in irreconcilable conflict. *Harrison v. Jones*, 412.
6. §§ 1528-35. Construed. *Ib.* 412. (Regulating practice of medicine).
7. § 2126. Construed. General assignment. *Warten v. Matthews*, 429.
8. § 2173. Construed. (Loans of personal property). *Butler v. Jones*, 436.
9. §§ 2641, 4205. Damages; selling liquor to minors. *King v. Henkie*, 505.
10. § 2928. Freeholders, where sued. *Katzenberg v. Lehman*, 512.
11. § 3697. Unlawful detainer. *McDevitt v. Lambert*, 536.
12. § 403. Bond of tax-collector. *Schuessler v. Dudley*, 546.
13. § 2908. Abatement of actions. *Fearn, Ex'r, v. Ward, Adm'r*, 555.
14. § 2597. Presentation of claims. *Fearn, Ex'r, v. Ward, Adm'r*, 555, 173.
15. § 2687. Divorce. *Wood v. Wood*, 254.
16. § 1692. County bridges. *Greene Co. v. Eubanks*, 204.
17. § 3512. Partition of property. *Ballard v. Johns*, 32.

CODE—*Continued.*

18. § 4346. Arson in first degree. *Sands v. The State*, 201.
19. § 2944. Detinue—separate valuation. *Johnson v. McLeod*, 433.
20. § 2694. Divorce and alimony. *Edwards v. Edwards*, 97.
21. §§ 2951-4, 2966. Adverse possession. *Hairston v. Dobbs*, 589, 594.
22. § 2531. Final settlements of estates. *Dickie v. Dickie*, 57.
23. § 3058. Party as witness. *Butler v. Jones*, 436, 528, 351.
24. §§ 2222-3. Satisfying record of mortgage. *Steiner & Bro. v. Snow*, 45.
25. § 2595. Final settlement of estates. *Modawell v. Hudson*, 265.
26. §§ 3302-3. Levy of execution. *Edwards v. Levinshon*, 447.
27. § 2711. Wife's separate estate. *Ward v. Johnston*, 281.
28. §§ 2735-41. Non-age relieved. *Cox v. Johnson*, 22.
29. §§ 2733-4. Husband's life insured by wife. *Fearn v. Ward*, 555.
30. § 2997. Tender of payment. *Com. Fire Ins. Co. v. Allen*, 571.
31. § 3112. Appeal from justice court. *Jones v. Collins*, 108.
32. § 3235. Statute of limitations. *Napier v. Foster*, 379.
33. §§ 3440-9. Lien of mechanics, &c. *Walker v. Daimwood & Norris*, 245.
34. § 3209. Executions. *Gassenheimer v. Molton*, 521.
35. §§ 1699-1700. Railroads; injuries to property. *Ala. G. S. R. R. v. McIlpine*, 73.
36. §§ 3498-3515. Sale of land by tenant in common. *Ballard v. Johns*, 32.
37. § 3120. Judgment for less than jurisdiction. *Morris v. Robinson*, 291.
38. § 3343. Sep. assm't, trial right of property. *Tait v. Murphy*, 440.
39. § 2199. Trusts in land. *Bates v. Kelly*, 142.
40. § 2294. Will-witness sign in presence of testator. *Moore v. Spier*, 129.
41. § 2154. Probate of deed. *England v. Hatch*, 247.
42. § 2238. Dower; quarantine. *Reeves v. Brooks*, 26.
43. § 3286. Advances to make crop. *Boyett & Wimberly v. Patton*, 476.
44. § 3024. Consolidation of actions. *Wilkinson v. Black*, 329.
45. § 2928. Householder. *Katzenberg v. Lehman*, 512.

COLLATERAL SECURITY.

1. *Pledge as collateral security; limitation of right to redeem.*—By an ancient rule of law, as laid down in old text-books and adjudged cases, if no time was fixed by the parties themselves for the redemption of a pledge, the pledgor was allowed his life-time within which to redeem, unless quickened by notice, or through the intervention of a court of equity; but the more modern, and the better rule, by analogy to that which applies to the redemption of mortgages, exacts of him the exercise of reasonable diligence, at the risk of being barred of all relief on account of the staleness of the demand. *Gilmer v. Morris*, 78.

COMMISSIONERS, COURT OF COUNTY.

1. *Power of Court of County Commissioners over public highways.*—In respect to the public highways, the Court of County Commissioners exercises a *quasi* legislative authority; and, in the absence of statutory provisions, the county is not responsible for the manner in which that authority is exercised.
2. *Liability of county for injuries caused by defective bridge.*—Under statutory provisions (Code, § 1692), where a bridge or causeway has been erected by contract with the Court of County Commissioners the county may protect itself against liabilities for injuries resulting from a defect in such bridge, by requiring of the

COMMISSIONERS, COURT OF COUNTY—*Continued.*

contractor a guarantee that it shall continue safe for the passage of the public for a stipulated time; but when no guaranty has been taken, or the stipulated period has expired, the effect and operation of the statute are to devolve on the county the legal duty to keep such bridge in repair while it remains part of an established public highway.

3. *Same; duty of county with respect to necessary repairs.*—The liability of the county having attached by the non-requirement of a guaranty, or by the expiration of the stipulated period, can not be divested by imposing upon the overseer of the public road the duty to keep such bridge in proper repair. *See Stanfill v. Court of County Rev. Dallas County, 287.*

COMMON CARRIER.

1. *Consignee allowed reasonable time to remove freight; when railroad company liable only as warehousemen.*—A consignee is allowed a reasonable time to remove goods after arrival at point of destination, and until expiration of such time the liability of the company, as a carrier, continues; but, on the failure of the consignee to remove them in a reasonable time, the railroad company is responsible thereafter, only as a warehouseman. *Louisville & Nashville R. R. Co. v. Oden, 38.*
2. *What stipulation in bill of lading unreasonable.*—A stipulation in a bill of lading that the railroad company shall be liable only as a warehouseman, after the arrival of the freight at point of destination, and that the consignee shall receive and take it away as soon as it is ready for delivery, without providing for notice to the consignee when it is so ready for him, is unjust and unreasonable. *Ib. 38.*
3. *Carrier's common-law liability may be limited by special contract.* A provision in the bill of lading exempting the railroad company from loss or damage "by fire or other casualty, while in transit, or in depots, or places of transshipment," to goods shipped, will be sustained, *except* as against losses resulting from a want of skill, or from the negligence of the agents or employees of the company. *Ib. 38.*
4. *Liability for goods lost, limited to value at place of shipment, just and reasonable.*—A stipulation in the contract of shipment by the railroad company, that in the event of the loss or damage to goods the company will only be responsible for their value at the place and time of shipment, is just and reasonable. *Ib. 38.*
5. *When carrier may maintain detinue.*—If the carrier, through mistake, or by the fraudulent representations of a third person, wrongfully delivers the goods to a person who has no right to them, he may maintain an action of detinue or trover for them, against the person so receiving them, or any other person to whom he may deliver them. *Young v. E. Ala. R'way Co.*

CONSTITUTIONAL LAW.

1. *Constitutional provisions regulating the taking of private property for public use by corporations.*—Under constitutional provisions formerly of force in Alabama, private property could not "be taken or applied for public use" by municipal corporations, without making just compensation; and this excluded a liability for consequential injuries, when there was no appropriation of the property itself. But the constitutional provision now of force (Art. XIV, § 7) requires corporations, invested with the power of taking private property for public use, to "make just compensa-

CONSTITUTIONAL LAW—Continued.

tion for the property taken, injured or destroyed by the construction or enlargement of its works, highways, or improvements;" and this new provision should be liberally construed in favor of the citizen. *City Council of Montgomery v. Townsend*, 480.

See *West. Union Tel. Co. v. State Board of Assessment*, 273.

CONTRACTS.

1. *Option to purchase; when contract of sale is complete.*—When one party offers to sell, and allows the other twelve months within which to elect whether he will purchase; if the latter elects to purchase within the given time, and gives notice of his election, the contract then becomes mutually obligatory, and a court of equity will decree specific performance in favor of either against the other; but, if the acceptance is conditional, or introduces an alteration or modification of the original proposal, the contract is not complete until the other party has signified his assent to the change. *Linn v. McLean*, 360.
2. *Negotiations through the mails.*—When the parties reside in different places, and conduct their negotiations through the mails, an offer or acceptance can not be retracted after it has been posted; and where the vendor and the attorney of the non-resident purchaser, through whom the negotiations were conducted, were in the same city negotiating in person, a letter posted by the attorney on the last day allowed for an election, declaring his acceptance, binds his client from the time it is posted, although it may not bind the other party until received. *Ib.* 360.
3. *Revocation of acceptance.*—A subsequent interview between the parties, on the day the letter was posted, can not be considered a revocation of the acceptance therein expressed, when the subject of the interview was a pending adverse suit for the land, and no allusion was made to the letter by either party. *Ib.* 360.
4. *Execution of conveyance and payment of purchase-money.*—A purchaser is not bound to accept a conveyance, the covenants of which are broken *eo instanti* on its execution; nor will he be compelled to accept a deed from his vendor, when an adverse claim to the land has been asserted, and the suit is still pending and undetermined. *Ib.* 360.
5. *Executory contract—what not an abandonment of right to damages.* Under an executory contract of sale, the option being reserved to the purchaser, when the first installment of purchase-money falls due, to treat the contract as a lease, pay rent for the year, and restore the possession of the premises in as good condition as when received; the acceptance of rent and the possession by the vendor is not an abandonment of his claim to damages on account of the failure to restore the premises in as good condition as when received. *Dicks v. Belsher*, 369.
6. *When plea may be struck from file.*—When a plea is substantially defective, it may be struck from the files on motion, without putting the plaintiff to his demurrer. *Ib.* 369.
7. *Option to purchase; when contract of sale is complete.*—When one party offers to sell, and allows the other twelve months within which to elect whether he will purchase; if the latter elects to purchase within the given time, and gives notice of his election, the contract then becomes mutually obligatory, and a court of equity will decree specific performance in favor of either against the other; but, if the acceptance is conditional, or introduces an alteration or modification of the original proposal, the contract is

CONTRACTS—*Continued.*

- not complete until the other party has signified his assent to the change. *Linn v. McLean*, 360.
8. *Oral stipulation; when admissible.*—While a written contract can not be contradicted or varied by parol evidence, it is permissible where the writing does not purport to set out the entire contract, to show by parol other stipulations not inconsistent with those expressed. *Powell et al. v. Thompson*, 51.
 9. *Written agreement not extended by parol.*—A tenant having given his note or written obligation for the rent, specifying a certain number of bales of cotton, it is not permissible to show by parol that he also agreed to deliver a certain quantity of cotton seed. *Ib.* 51.

CORPORATIONS.

(a). MUNICIPAL.

1. *Taking private property for public use.*—The State itself can not, in the exercise of the right of eminent domain, take private property for public uses, without a regular judgment of condemnation in a proper judicial proceeding, first making payment of just compensation to the owner; nor can a municipal corporation dedicate private property to public use, by a mere ordinance so declaring, without the owner's acquiescence or consent. *Smith v. Inge*, 283.
2. *Dedication of street in city or town.*—A dedication of land for a street, in an incorporated city or town, must precede an acceptance by the corporate authorities; and a dedication will not be presumed from mere user for any period short of twenty years, when unaccompanied by any act on the part of the owner clearly showing his acquiescence; nor even after the expiration of twenty years when it is shown that the owner, during that period, contested or constantly interrupted the user. *Ib.* 283.
3. *Constitutional provisions regulating the taking of private property for public use by corporations.*—Under constitutional provisions formerly of force in Alabama, private property could not "be taken or applied for public use" by municipal corporations, without making just compensation; and this excluded a liability for consequential injuries, when there was no appropriation of the property itself. But the constitutional provision now in force (Art. XIV, § 7) requires corporations, invested with the power of taking private property for public use, to "make just compensation for the property taken, injured or destroyed by the construction or enlargement of its works, highways, or improvements;" and this new provision should be liberally construed in favor of the citizen. *City Council of Montgomery v. Townsend*, 489.
4. *Same; grading, construction or enlarging of streets and sidewalks.* Under this constitutional provision, while compensation is required for property taken, injured or destroyed in the exercise of the right of eminent domain by a public corporation, the liability is limited to injuries, caused "by the construction or enlargement of its works," etc.; and this neither restricts the liability to the original taking and opening of a street, leaving the corporation at liberty to make subsequent changes by grading at its own will and caprice, nor does it impose a liability for additional compensation on every subsequent change by grading or otherwise. Ordinary and reasonable changes and improvements, due to the natural formation of the surface, or to a safe and convenient way (including sidewalks), are presumed to have been contemplated by the parties at the time of the original taking or dedication, and

CORPORATIONS—*Continued.*

compensation can not afterwards be claimed for injuries resulting therefrom; but a material change in the street (which also includes the sidewalks), caused by a contingency which could not have been reasonably and fairly foreseen, or made merely because the corporate authorities may judge that the public convenience would be thereby increased, or the general appearance of the streets improved, if injury is thereby caused to the adjoining premises, is a new injury, for which compensation may be claimed. *Ib.* 489.

5. *Same; question for court or jury.*—Whether the cutting down of the sidewalk adjacent to plaintiff's lot, to the level of the street below (about fifteen feet), was a *construction* of the highway within the meaning of the constitutional provision, was a mixed question of law and fact; and the court erred in instructing them that the plaintiff was entitled to recover, if his property was injured, without regard to the circumstances or character of the alteration. *Ib.* 489.
6. *Same; measure of damages.*—If the plaintiff is entitled to recover compensation for the injury to his property, the measure of his damages is the difference in the market value of his lot before and after the sidewalk was cut down; and neither the falling of his brick wall, nor the apprehended undermining of his house by subsequent rains can be considered in estimating the damages. *Ib.* 489.
7. *Power of Court of County Commissioners over public highways.*—In respect to the public highways, the Court of County Commissioners exercises a *quasi* legislative authority; and in the absence of statutory provisions, the county is not responsible for the manner in which that authority is exercised. *Greene Co. v. Eubanks*, 204.
8. *Liability of county for injuries caused by defective bridge*—Under statutory provisions (Code, § 1692), where a bridge or causeway has been erected by contract with the Court of County Commissioners the county may protect itself against liability for injuries resulting from a defect in such bridge, by requiring of the contractor a guaranty that it shall continue safe for the passage of the public for a stipulated time; but when no guaranty has been taken, or the stipulated period has expired, the effect and operation of the statute are to devolve on the county the legal duty to keep such bridge in repair while it remains part of an established public highway. *Ib.* 204.
9. *Same; duty of county with respect to necessary repairs.*—The liability of the county having attached by the non-requirement of a guaranty, or by the expiration of the stipulated period, can not be divested by imposing upon the overseer of the public road the duty to keep such bridge in proper repair. *Ib.* 204.
10. *Constitutionality of laws abolishing city of Mobile and creating port of Mobile; by whom questioned.*—The constitutionality of the legislation abolishing the city of Mobile as a municipal corporation, and creating the port of Mobile its successor (Sess. Acts 1878-79, pp. 381-92; *Ib.* 1880-81, pp. 329-32), can not be assailed by a person who does not show that his rights or remedies as a creditor of the old corporation are thereby destroyed or impaired, or that he is otherwise in a position to be injured. *Smith v. Inge*, 283.
11. *Validity of municipal ordinance prohibiting importation or sale of second-hand clothing, bedding, &c.*—Power conferred on a municipal corporation, by its charter, "to pass and enforce all ordinances deemed necessary or proper to prevent the introduction of infectious or contagious diseases, and to preserve the health of the inhabitants," does not confer authority to enact an ordinance

CORPORATIONS—*Continued.*

making it unlawful for any person "to import, sell, or otherwise deal in second-hand or cast-off garments, blankets, bedding or bed-cloths," with a proviso excepting the sale of such articles when not imported, or which have not been used by persons having infectious diseases. *Town of Greensboro v. Ehrenreich*, 580

COSTS.

1. *Security for costs; overruling of motion to dismiss suit for want of; when revisable.*—In an action brought by a corporation, or a non-resident, the overruling of a motion to dismiss the suit, on account of a failure to give security for the costs, is not revisable on error or appeal, unless reserved by bill of exceptions. *Hyde v. Adams*, 111.
2. *Costs improperly charged against estate.*—Costs and expenses incurred in propounding and establishing the probate of a will, by a person who is not therein named as executor, and upon whom is cast no legal or moral duty to establish the will, are not a proper charge against the estate; and when such costs and expenses are incurred by one of the distributees, by agreement with the others, and letters of administration are granted to him, the adjustment of the matter between them, according to the agreement, is not within the jurisdiction of the Probate Court on the settlement of the administrator's accounts. *Gayle v. Johnson*, 388.
3. *Costs taxed in favor of successful joint defendant.*—In a judgment in favor of one joint defendant and against another, a recital that the successful defendant "go hence and recover of the plaintiff his costs in this behalf expended," means that he recover that part of the costs which he himself had incurred. *Morris v. Robinson*, 291.
4. *Judgment for costs, on joint conviction of two or more defendants.* When two or more persons are jointly indicted for a felony, jointly tried and convicted, whether a joint judgment is rendered against all, or a separate judgment against each, each is liable for the entire costs; though but one payment can be enforced, and, in the event of unequal payments, contribution may be recovered as between themselves. *Dawson v. Sayre*, 444.
5. *Same; apportionment of costs.*—In joint prosecutions, there may be cases in which the court should not tax the entire costs against the defendants who are convicted, including the costs of witnesses for those who are acquitted; but, when all are convicted, and the whole costs are adjudged against each, the clerk has no authority to apportion the costs among them, thereby reducing the amount in each case to less than \$150, and require the president of the board of inspectors of convicts to deliver his certified statement of the costs to the contractor to whom the convict is assigned and delivered, and who is required to pay to the clerk the full amount of the costs so certified, not exceeding \$150 in one case. *Ib.* 444.

COUNTIES.

1. *Counties*, though bodies corporate under the statute are, more strictly speaking, political or civil divisions—governmental or auxiliary agencies—and the powers conferred on them are delegated for the purposes of civil and political organization, and can not be said to be violative of the maxim that legislative powers can not be delegated. *Stanfill v. Court of Rev. Dallas Co.*, 287.

COURT, PROBATE.

1. *Title to lands descends to heirs and vests in them immediately upon the death of the person who is seized and possessed of a heritable estate therein.*—On the death of a person who is seized and possessed of a heritable estate in lands, the title at once descends and vests in his heirs or devisees, subject to the widow's rights of homestead and quarantine, and to the exercise by the administrator of the statutory powers conferred on him; and with the title the right of possession passes, and the right to the rents and profits accruing until they are intercepted by the administrator; nor can the administrator hold them responsible for the rents and profits thus received. *Gayle v. Johnson, 388.*
2. *Receiver holds for benefit of parties.*—A receiver, in a chancery suit, holds for the benefit of the parties pending the suit, and, on its termination, for the benefit of the party who is ascertained to be entitled to the fund or property; and while the rights of a stranger, intervening *pro interesse suo*, will be protected, they can not be enlarged by reason of the receivership. *Ib. 388.*
3. *When receiver's possession is that of heirs.*—A receiver of the rents and profits of real estate being appointed, pending a suit between the heirs at law and the surviving husband of the decedent, to which the administrator was not a party; on the termination of the suit in favor of the heirs, the possession of the receiver is their possession, and the rents and profits received by him can not be claimed by an administrator subsequently appointed. *Ib. 388.*
4. *Sale of decedent's lands for distribution; when title of heirs is divested.*—When a decedent's lands are sold for distribution, under an order and decree of the Probate Court, the title of the heirs is not divested until the purchase-money has been paid in full. *Gardner v. Kelso, 497.*
5. *Application to judge of probate to quash election proceedings.*—If an order for an election is void on its face, and the appellee has sufficient interest, the application, in the first instance, is properly made to the judge of probate to quash the proceedings. *Miller v. Jones, 89.*
6. *The proceedings to obtain an election under the act approved December 11th, 1884, create a new, limited and special jurisdiction, not covered by the grant of general jurisdiction to the probate courts, and not previously exercised by the judge, requiring for its exercise that the preliminary and essential facts be affirmatively stated.* *Ib. 89.*
7. *"An Act to 'regulate' the sale, giving away or otherwise disposing of spirituous liquors,"* does not confer the power to *prohibit* the sale thereof; and where the body of the act provides as well for its prohibition as for the regulation of the sale, and the title expresses only that the act is to *regulate the sale, giving away, &c., of spirituous liquors*, such act is violative of the constitutional requirement that, "Each law shall contain but one subject, which shall be clearly expressed in its title." *Ib. 89.*
8. *Bill seeking to correct errors of law and fact in probate decree; when presumption can not be indulged against regularity of decree.* When the bill seeks to correct errors of law and fact in a probate decree, rendered on the settlement of an administrator's accounts, which is not set out, nor any errors or defects specified, but which is designated as "what purports to be a final settlement," no presumption can be indulged against the regularity of the decree; and the general averment that there had never been any final settlement, in the absence of facts supporting the averment, is not sufficient, being the mere statement of a legal conclusion. *Watts v. Frazer, 186.*

COURT OF PROBATE—*Continued.*

9. *Judgment or decree against minor represented by guardian ad litem.* A minor, when represented by a guardian *ad litem*, is as much bound by a judgment or decree as an adult; and an averment of the complainant's infancy at the rendition of a decree on the settlement of an administrator's accounts, without an additional averment that he was not represented by guardian *ad litem*, shows no equitable ground for relief against it. *Ib.* 186.
10. *Jurisdiction of Probate Court to order sale of decedent's lands; when proceedings can not be collaterally impeached.*—The Probate Court acquires jurisdiction to order a sale of a decedent's lands, on the filing of a petition by a proper person, setting forth a statutory ground of sale; and when the jurisdiction has thus attached, the proceedings can not be collaterally impeached on account of mere irregularities or errors. *Ib.* 186.
11. *Requisites of application.*—In an application for the sale of property for division or distribution among several tenants in common (Code, §§ 3498, 3515), the petition must set forth the names and residences of all the parties interested in the property, and this statutory requirement, which is jurisdictional, includes the petitioner.—*Ballard v. Johns*, 32.
12. *Same; death of co-tenant.*—If the petition shows that one of the tenants in common has died, it must show to whom his interest has descended, or in whom it has become vested, and such persons must be made parties.—*Ib.* 32.
13. *Administrator ad litem for deceased co-tenant.*—If it appears that the deceased tenant owed debts at the time of his death, the court should appoint an administrator *ad litem* to protect the interest of creditors.—*Ib.* 32.
14. *False claim does not oust jurisdiction.*—Although a partition or sale can not be decreed by the Probate Court, where an adverse claim or title is asserted (Code, § 3512), yet the jurisdiction of the court will not be ousted by a false assertion of an adverse claim by one of the defendants.—*Ib.* 32.
15. *Surviving husband necessary party.*—The surviving husband of a deceased tenant in common is a proper and necessary party to proceedings for partition.—*Ib.* 32.

PROBATE OF WILL.

16. *Misjoinder; when objection to, waived.*—When the probate of a will is contested by one of the testator's children, who is a married woman, if it is improper to join her husband with her as a contestant, the misjoinder is waived by joining issue and going to trial on the merits, and is not available on motion in arrest of judgment.—*Blake et al. v. Harlan et al.* 37.
17. *Application to judge of probate to quash election proceedings.*—If an order for an election is void on its face, and the appellee has sufficient interest, the application, in the first instance, is properly made to the judge of probate to quash the proceedings. *Miller v. Jones*, 89.
18. *What shall be certified to Circuit Court.*—To enable the Circuit Court to act intelligently, it is necessary to certify to that court the whole matter on which the action of the judge of probate was invoked, so that the Circuit Court could determine, upon an inspection of the record, whether the judge of probate had jurisdiction to order the election and fix the time for holding the same. *Ib.* 89.
19. *Jurisdiction of Probate Court to order sale of decedent's lands; when proceedings can not be collaterally impeached.*—The Probate Court acquires jurisdiction to order a sale of a decedent's lands, on the

COURT OF PROBATE—*Continued.*

filing of a petition by a proper person, setting forth a statutory ground of sale; and when the jurisdiction has thus attached, the proceedings can not be collaterally impeached on account of mere irregularities or errors.—*Watts v. Frazer*, 186.

20. *Same; when order of sale void and the sale a nullity.*—If the jurisdiction of the court never attached, the order of sale is void, and the sale a nullity; and the remedy at law to recover the land being plain and adequate, the heirs can not come into equity to set aside the sale.—*Ib.*
21. *Sale of lands by decree under probate court.*—When land is sold by a guardian, under a probate decree, the sale is not complete until confirmation, and the title does not pass until the purchase-money is paid.—*East v. East*, 199.
22. *Final settlement of guardian's accounts; when probate court has not jurisdiction.*—The probate Court has no jurisdiction to make a final settlement of a guardian's accounts during the minority of the ward, and while the legal relation between them still exists. *Glass v. Glass*, 241.
23. *Same; (this case).*—Where the record shows that the guardian's accounts for final settlement were filed on the 14th November, and his resignation filed on the 14th January afterwards, on which day also a final settlement of his accounts was made with the court, the settlement is void, and can not be supported on the principle of retrospective relation.—*Ib.* 241.
24. *Decree of insolvency; when not conclusive on heirs and distributees.* A decree of the Probate Court declaring an estate insolvent, and subsequent proceedings based on that decree, rendered and had prior to the enactment of the statute, approved December 4, 1878 (Sess. Acts. 1878-9, p. 69), are not conclusive on the heirs and distributees, legatees and devisees, who were not parties, and had no right to file objections to claims, nor to contest the administrator's accounts.—*McMillan v. Rushing*, 402.

CRIMINAL LAW.

1. *Attempted fraud in procuring testimony; when properly considered to disadvantage of party attempting same.*—If a party attempts to practice a fraud on the court, by procuring or assisting to procure testimony which he knows to be false, or resorting to any other artifice designed to deceive or mislead, this is a circumstance which the jury may properly consider to his disadvantage; but, to justify a charge invoking this principle, there must be something more than a mere contradiction between the defendant's own testimony and the testimony of the witnesses against him. *Beck v. The State*, 1.
2. *Abstract charge; when reversal worked by.*—An abstract charge, even though it asserts a correct legal proposition, will work a reversal, when it may have misled the jury.—*Ib.* 1.
3. *Trial by impartial jury.*—The purpose of the statutory provisions for drawing, summoning and empanelling jurors for the trial of persons indicted for capital felonies, is to secure a trial by an impartial jury.—*Evans v. The State*, 4.
4. *From whom jury is selected.*—It is the right of the defendant to have a jury selected from all the persons summoned as special and regular jurors who are in attendance and competent, only subject to any contingency and necessity that may arise from the operation of the statutory provisions, but where the same persons are drawn and summoned for the trial of two defendants indicted for separate capital felonies, to be tried on the same day, should one or more of them be engaged in the consideration of the case

CRIMINAL LAW—Continued.

- of one of the accused, while a jury is being selected for the trial of the other, the necessity in such case is created by the act of the court, and is in violation of the requirements of § 4874 of the Code.—*Ib.* 4.
5. *Robbery; what constitutes.*—Snatching a thing from the hands of another, accompanied with violence, or threats creating apprehensions of bodily harm, or resistance however slight, constitutes robbery. *Ib.* 4.
 6. *Arrest by town marshal for breach or attempted breach of peace; prisoner has no right to select officer before whom he will be tried.* A person arrested by a town marshal, for a breach or attempted breach of the peace committed in his presence, has no right to select the officer before whom he will be tried, nor can he object to being brought to trial before the mayor or intendant of the town.—*Hayes v. Mitchell*, 183.
 7. *Actual breach of the peace not necessary to justify arrest by marshal; may act on appearances, and arrest to prevent threatened breach.* In the performance of his duty to prevent threatened breaches of the peace, a town marshal, or other municipal police officer, may act on the reasonable appearance of things, and make arrests before an actual breach of the peace is committed; and he may justify on the ground of such reasonable apprehension of violence, when sued for the arrest.—*Ib.* 183.
 8. *Jurisdiction of justice of the peace under statute against cruelty to animals.*—Justices of the peace have not final jurisdiction of offenses committed in violation of the statute against "cruelty to animals," (approved, February 23, 1883,—Sess. Acts 187—amended, February 17, 1885,—Sess. Acts 159,) there being nothing in either statute which confers such jurisdiction. *Horton v. The State*, 8.
 9. *Finding of the court upon testimony, not reviewed on appeal.*—In a prosecution for a misdemeanor, before the County Court, the case being submitted to the decision of the court without the intervention of a jury, its finding on the facts can not be reviewed, or revised, by this court, on appeal. *Knowles v. The State*, 9.

RETAILING SPIRITUOUS LIQUORS.

10. *Whether liquor sold, was intoxicating may be shown by its effects on those using it.*—In a prosecution for selling intoxicating liquor, in violation of a local prohibitory law, a witness for the prosecution having testified, that the liquor, or beverage sold by the defendant produced on him effects similar to those produced by whisky, it is competent for the defendant to prove by other witnesses who had drunk it, that it had no intoxicating effect on them. *Ib.* 9.

ARSON.

11. *Indictment for arson; sufficiency of.*—An indictment for arson as defined by section 4346 of the Code of 1876, and which substantially pursues the form (No. 34, p. 995 of the Code), charges the offense of arson in the first degree with sufficient certainty. *Sands et al. v. The State*, 201.
12. *Same; sufficiency of averment of ownership of building burned.*—The description in the indictment of the property burned, as "the jail of Wilcox county," is a sufficient averment of ownership, the courts judicially knowing that the county jails in this State are the property of the several counties in which they are located, and that each county in the State is a body corporate. *Ib.* 201.

CRIMINAL LAW—Continued.

MALICIOUS PROSECUTION.

13. *Conduct and language of prosecutor connected with arrest ; when admissible as tending to establish malice.*—In an action for a malicious prosecution, it is competent for the plaintiff to show any acts, conduct or words of the defendant on the day of the plaintiff's arrest, and while he was in custody, tending to establish malice or other improper motive in the prosecution, or a purpose to vex or oppress the plaintiff; but, the defendant not being liable for any acts or declarations of the sheriff, beyond the usual and proper mode of executing the process, unless he instigated, authorized or participated in them, the declarations of the sheriff to the plaintiff, not made in the presence of the defendant, are not competent evidence for the plaintiff. *Motes v. Bates, 382.*
14. *Impeachment of witness ; limitation of inquiring into character.*—In impeaching a witness, the inquiry is not limited to his general character for truth, but may be extended to his character generally. *Ib. 382.*
15. *Advice of counsel ; when constituting a defense.*—To make the advice of counsel a defense to such action, it is not necessary that the prosecutor should have made a full and fair disclosure of all the facts in the case, but only of all the facts known to him, or which he could have ascertained by reasonable diligence. *Ib. 382.*
16. *Parol license to pass through lessor's lands ; when revocable.*—When a rented field is accessible by a public road, permission to use a shorter pathway through the lessor's other lands will not be implied from its greater convenience; and its use without objection is no more than a parol license, which is revocable at pleasure; but, if the use of the pathway was part of the contract, or was held out as an inducement to the contract, the lessor would be estopped from prohibiting its rightful use by the lessee or his servants. *Ib. 382.*
17. *Indictment not evidence of probable cause.*—The finding of an indictment by a grand jury is not *prima facie* evidence of probable cause. *Ib. 382.*

ROBBERY.

18. *Robbery ; what constitutes.*—Snatching a thing from the hands of another, accompanied with violence, or threats creating apprehensions of bodily harm, or resistance however slight, constitutes robbery. *Evans v. The State, 4.*

JURORS AND JURY.

19. *Trial by impartial jury.*—The purpose of the statutory provisions for drawing, summoning and empanelling jurors for the trial of persons indicted for capital felonies, is to secure a trial by an impartial jury. *Evans v. The State, 4.*
20. *From whom jury is to be selected.*—It is the right of the defendant to have a jury selected from all the persons summoned as special and regular jurors who are in attendance and competent, only subject to any contingency and necessity that may arise from the operation of the statutory provisions, but where the same persons are drawn and summoned for the trial of two defendants indicted for separate capital felonies, to be tried on the same day, should one or more of them be engaged in the consideration of the case of one of the accused, while a jury is being selected for the trial of the other, the necessity in such case is created by the act of the court, and is in violation of the requirements of § 4874 of the Code. *Ib. 4.*

CUSTOM.

1. *Custom; when can not alter written agreement.*—The landlord, suing in case for the conversion of his tenant's crop, whereby his statutory lien was lost, can not be allowed to "prove that it was a rule or custom he had made on his plantation that he should have all the cotton seed raised on the land by his tenants;" because one man can not establish a custom, and because such evidence contradicts the terms of the note for rent., which specified that a certain number of bales of cotton should be delivered as rent. *Powell et al. v. Thompson, 51.*

DAMAGES.

1. *Breaches must be alleged in complaint.*—The plaintiff having agreed and undertaken, for a specified price, to unload for defendant certain cars laden with lime rock, "at such times and places as may be ordered by defendant," an action does not lie to recover the stipulated compensation, unless the service was ordered or directed by defendant, or was performed by his authority, express or implied; and the fact that it was so done must be alleged in the complaint. *Flouss & Kennedy v. The Eureka Co., 30.*
2. *In action for damages, employee need not aver that employer had reasonable time after notice to repair.*—In an action to recover damages on account of injuries afterwards sustained, it is not necessary to aver in the complaint that the employer had had reasonable time to remedy the defect after the notice was given. *Woodward Iron Co. v. Jones, 123.*
3. *Same; measure of damages.*—If the plaintiff is entitled to recover compensation for the injury to his property, the measure of his damages is the difference in the market value of his lot before and after the sidewalk was cut down; and neither the falling of his brick wall, nor the apprehended undermining of his house by subsequent rains can be considered in estimating the damages. *City Council of Montgomery v. Townsend, 489.*

4. See ATTACHMENT BONDS, ADMINISTRATORS AND EXECUTORS.

5. *When action lies generally; contributory negligence as defense.*—The statute which gives an action for damages to the personal representative of a deceased person, whose death was "caused by the wrongful act or omission of another," is limited to cases in which the deceased person himself, if death had not ensued, might have maintained an action for the same act or omission (Code, § 2641); and since contributory negligence on the part of the deceased would have been a complete defense to an action by him, it is equally a defense to an action by his personal representative. *King v. Henkie, 505,*
6. *Measure of damages.*—In an action against a sheriff and his sureties, for levying an attachment against a third person on plaintiff's goods, there being no aggravating circumstances, the measure of damages is the value of the goods at the time they were taken, with interest to the day of the trial. *Ellis v. Allen, Bush & West, 515.*

DEEDS.

See PLEADINGS AND PRACTICE, 3.

1. *Defective probate of deed; when certified copy not evidence.*—When a deed has been recorded within twelve months from its date but the certificate of probate or acknowledgment is substantially de-

DEEDS—Continued.

- factive (Code, § 2154), a certified copy is not admissible as evidence without further proof, *England v. Hatch*, 247.
2. *Conveyance recorded more than twenty years presumed to have been properly probated.*—Under the rule laid down in *Hutchings v. White*, 40 Ala. 253, if the deed has been recorded in the proper office for more than twenty years, the presumption will be indulged that its execution was legally proved or acknowledged; but the court is unwilling to extend the rule to deeds which have not been recorded twenty years. *Ib.* 247.
 3. *Destruction of deed.*—The destruction of a deed does not work a divestiture of the grantee's title. *Stapp v. Wilkinsoa*, 47.
 4. *Conveyance of lands executed by husband and wife jointly and attested by two witnesses; when sufficient to convey wife's interest.*—A deed by two witnesses, is sufficient to convey whatever interest the wife has, unless the consideration was the payment of the husband's debt; and the payment of part of the consideration in cash, and the balance in extinguishment of a prior vendor's lien, is sufficient to uphold it as a sale. *Reynolds v. Caldwell*, 232.
 5. *Conveyance of homestead by married man without signature and assent of wife.*—An absolute conveyance of his homestead by a married man, without the voluntary signature and assent of his wife, is a nullity, and an executory agreement to convey is equally null and inoperative. *Striplin & Co. v. Cooper & Son*, 256.
 6. (*"Rule in Shelley's Case" applied—Right of heirs to sue*).—The "Rule in Shelley's Case," as at common law, prevailed in this State until the 17th January, 1853, when the Code of 1852 became operative; and deeds and wills which took effect before that date, are governed by it. *McQueen v. Logan, et al.* 304.
 7. *Same*; A deed, executed in 1841, by which lands were conveyed to a trustee, "for the purpose of providing a permanent domicile and home for the said Jane C. M.," a married woman, "and such family as she may have, for their use and benefit during her natural life, and at her death to descend to and be equally divided among and between her heirs", under the operation of the rule in Shelley's Case, vested the entire estate in Mrs. M.; and if her children took any present interest, as members of "the family," their right to sue for it was not postponed until her death. *Ib.*
 8. It is error to admit oral testimony of the intention with which a deed is executed. *Morris v. Robinson*, 291.
 9. *Unrecorded absolute conveyance, intended only as security for loan; validity as against creditors.*—A conveyance absolute in form, but intended only as a security for a loan, as shown by a bond with condition to convey on payment of the debt, the papers not being recorded, and no change of possession being shown, is constructively fraudulent as against existing creditors; but, as against subsequent creditors, a fraudulent intent, or actual fraud, must be shown. *Tryon et al. v. Flournoy & Epping*, 321.
 10. *Same; ignorance of law, as excuse for failure to record; concealment of contents of deed.*—If the creditor, being a resident of Georgia, was ignorant of the fact that the laws of Alabama required registration of such conveyance and defeasance, and for this reason failed to have it recorded until after the lapse of nine or ten months, this would be sufficient to rebut any fraudulent intent on his part; nor can he be charged with a fraudulent intent, because the debtor, when acknowledging the conveyance, attempted to conceal its contents. *Ib.* 321.
 11. *Secondary evidence of lost deed.*—As to the alleged deed from Cothran & Elliott to Cadow, the court holds, as on the former

DEEDS—*Continued.*

appeal (78 Ala. 150), that the proof of its existence and destruction was sufficient to let in secondary evidence of its execution and contents. *Elliott v Dyche et als*, 376.

12. *Proof of deed executed in another State.*—As to a deed executed in Georgia, the presumption is that the subscribing witnesses also resided there; and it is not necessary to produce them, nor to account for their absence, before adducing secondary evidence of its execution. *Ib.* 376.
13. *What not statement of opinion* —When a witnesses testifies to the existence and subsequent destruction of a deed which he has seen and read, and further states, "The paper writing now shown me is, I verily believe, a true copy of said deed," this is not the statement of a mere opinion, and does not render his testimony inadmissible. *Ib.* 376.

DETINUE.

See *Raney v. Raney*, 157.

1. *Assessing separate value of articles sued for.*—In an action for the recovery of personal property *in specie*, the articles sued for being described in the complaint as "one lot of staves and saw-logs," a verdict for the plaintiff should assess the value of the staves and logs separately (Code, § 2944); and if only their aggregate value is assessed, a judgment following the verdict is erroneous. *Johnson v. McLeod, Adm'r*, 433.
2. *Assessing separate value of articles levied on.*—On the trial of a statutory claim suit for four yokes of oxen and two carts, verdict and judgment being rendered for the plaintiff in execution [Code, § 3343], the value of each article must be assessed separately, and it is error to assess a gross sum as the aggregate value. *Tait v. Murphy*, 440.
3. *Felling and conversion of timber by trespasser upon land; when owner may maintain trover or detinue.*—When a trespasser enters upon land, fells timber, and converts it to his own use, the owner may maintain trover for the conversion, or detinue for the property, if it can be identified, notwithstanding any change in its form; but this principle does not apply to timber cut by an adverse possessor. *Street v. Nelson*, 230.

DIVORCE.

See CHANCERY PLEADING AND PRACTICE, 1, 2, 19.

1. *Chancellor's conclusion in this case affirmed, there being no decided preponderance of evidence against correctness of.*—On consideration of the evidence in this record, the court can not affirm that there is a decided preponderance against the correctness of the chancellor's conclusion, and therefore affirms his decree refusing to grant a divorce to the complainant.—*Edwards v. Edwards*, 97.
2. *Alimony; pending suit for divorce; pending appeal to this court.* Pending a suit for divorce, the wife is entitled, as of right, to an allowance for temporary alimony out of the husband's estate (Code, § 2694); but an application for alimony pending an appeal to this court, being subsequent to the appeal, is not subject to revision by this court on the appeal. *Ib.* 97.
3. *Divorce; actual or apprehended violence as ground of.*—The wife is entitled to divorce when the husband has committed actual violence on her person, attended with danger to life or health, or when, from his conduct, there is reasonable apprehension of such violence. (Code, § 2687). But, to bring a case within this stat-

DIVORCE—*Continued.*

ute, actual violence, or a reasonable apprehension thereof, must be shown; and insulting words, offensive manners, want of civil attention, or other conduct which shocks the sensibilities, wounds the feelings, and causes grief and domestic unhappiness, is not sufficient. *Wood v. Wood*, 254.

4. *Collusion implied from pleadings.*—On bill for divorce by the husband, charging adultery by the wife, evidence being taken by both parties, and the litigation conducted with zeal and earnestness on both sides, until about the time when the cause was submitted for decision, when, by agreement of record, the cause was submitted on the testimony of the complainant's witnesses alone, and an agreement as to alimony and solicitor's fees; *held*, that the record suggested collusion between the parties, and stimulated vigilance on the part of the court in the examination of the evidence on which a decree of divorce was founded. *Powell v. Powell*, 595.
5. *Proof of adultery.*—While a divorce may be granted on the ground of adultery, on circumstantial evidence only, "the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion" that the offense had been committed; and where the evidence points to only two occasions, and the circumstances proved, in each case, are susceptible of an innocent construction, a divorce should not be granted. *Ib.* 595.

DOWER.

See CHANCERY I JURISDICTION AND GENERAL PRINCIPLES, 7, (p. 26.)

1. *Right of widow before assignment of dower.*—The widow has no legal estate or interest in the lands of the deceased husband until a specific part of the land is allotted and set apart for her dower estate; her interest, until then, being equitable, in its nature a right lying in action. *Reeves v. Brooks*, 26.
2. *Assignability of widow's dower interest before allotment at law.*—The right of dower not being a legal estate, before assignment, is not, in law, the subject of conveyance to a stranger. Notwithstanding such conveyance the heir may successfully maintain ejectment against the grantee for the recovery of possession. *Ib.* 26.
3. *Same; in equity.*—In equity the interest of the assignee is protected, and he is treated as succeeding to the right of the assignor, and as the owner of the thing transferred. The assignment of the widow's right of the dower, before allotment, though inoperative at law, is effective in a court of equity, that will, in a proper case, enforce her transfer, and protect the rights of her transferee. *Ib.* 26.
4. *Right of widow to rents during quarantine.*—Under the statute, § 2238, *Code*, the widow may retain possession of the dwelling and the plantation connected therewith, until the assignment of her dower. During such time she may rent the premises; and, if the administrator, heir or other person, receives the rent, she may recover it from him. *Ib.* 26.

EJECTMENT.

1. *Ejectment; what essential to maintain.*—To maintain ejectment, or the statutory action in the nature of ejectment, the plaintiff must have, at the commencement of the suit, the legal title, and the right of immediate possession. *Grandin v. Hurt*, 116.

EJECTMENT—Continued.

2. *Plaintiff in ejectment must recover on strength of his own title.*—In ejectment, or statutory action in the nature of ejectment, the plaintiff must recover, if at all, on the strength of his own title; and when he fails to make out a *prima facie* case, the defendant is not required to adduce any evidence, nor will erroneous rulings on evidence offered by the defendant work a reversal. *England v. Hatch*, 247.
3. (*Adverse possession perfects title.*)—Uninterrupted possession by defendant and his vendor, for twenty-eight years before suit brought, under written claim of title, accompanied by the usual acts of ownership, “perfects a title against all the world, unless there be a claimant armed with a paramount title, yet so circumstanced that he could not assert his title until the occurrence of an event which has happened within less than ten years before the commencement of the suit.” *McQueen v. Logan*, 304.
4. (“*Rule in Shelley’s Case*” applied—*Right of heirs to sue*).—The “*Rule in Shelley’s Case*,” as at common law, prevailed in this State until 17th January, 1853, when the Code of 1852 became operative; and deeds and will which took effect before that date, are governed by it. *Ib.* 304.
5. *Same.*—A deed, executed in 1841, by which lands were conveyed to a trustee, “for the purpose of providing a permanent domicile and home for the said Jane C. M.,” a married woman, “and such family as she may have, for their use and benefit during her natural life, and at her death to descend to and be equally divided among and between her heirs,” under the operation of the rule in *Shelley’s Case*, vested the entire estate in Mrs. M.; and if her children took any present interest, as members of “the family,” their right to sue for it was not postponed until her death. *Ib.* 304.
6. *Mortgagee; when legal title in.*—A mortgagee has the legal title, and the right of immediate possession, unless the instrument contains a stipulation postponing his right of possession. *Grandin v. Hurt*, 116.
7. *Effect of stipulations in mortgage, on mortgagee’s right to maintain ejectment (this case).*—The mortgage having been given to secure the payment of a note which the mortgagor had assigned to the mortgagee, and containing a stipulation that the latter should not “institute any proceeding to foreclose,” until the maker and indorser had been sued to insolvency, the right to take possession is postponed until the happening of this contingency; and the mortgagee can not maintain ejectment before that time. *Ib.* 116.
8. *What title will authorize recovery.*—To authorize a recovery in ejectment, or the statutory action in the nature of ejectment, the plaintiff must, as a general rule, have a legal title at the commencement of the action, and that title must continue up to the time of the trial; but, when he sues as the owner of an estate *per autre vie*, which terminates before the trial, though he can not recover the possession, he may recover mesne profits, or damages. *Hairston v. Dobbs*, 589.
9. *Merger of life-estate in fee.*—When the owner of an estate for life acquires by purchase the remainder or reversion fee, the less estate becomes merged in the greater, and his title is an absolute fee, on which he may recover in ejectment, or the statutory action in the nature of ejectment, commenced before he acquired the fee. *Ib.* 589.
10. *Permanent improvements, under adverse possession for three years; and possession under color of title in good faith, limiting liability for rents.*—A suggestion of adverse possession for three years, and

EJECTMENT—*Continued.*

the erection of permanent improvements (Code, §§ 2951-54), and possession under color of title in good faith, whereby the liability for rents is limited to one year before the commencement of the suit (*Ib.* § 2966) are inconsistent defenses, and can not be pleaded together; and when so pleaded, if the defendant will not elect between them, both of them should be struck out by the court. *Ib.* 589.

EQUITY.

See CHANCERY.

ERROR AND APPEAL.

1. *Cross appeals in action at law.*—In an action at law, where each party appeals and assigns errors, the judgment must be either affirmed or reversed as a whole; and if reversed on either appeal, it must be reversed entirely.—*Ala. Gr. So. R. R. Co. v. McAlpine & Co.* 73.
2. *Appeal from justice's judgment when sum claimed exceeds twenty dollars; formation of issue.*—On appeal from a justice's judgment when the sum claimed exceeds twenty dollars, the cause must be tried "on an issue to be made up under the direction of the court (Code, § 3122); but it is not necessary that the record should show the active interference of the court in the formation of the issue, when not requested; and it will be presumed, when pleas to the merits are found in the record, that the cause was tried on them without objection.—*Jones v. Collins*, 108.
3. *Appeal; when dismissed.*—An appeal from a decree rendered on the contested probate of the will, taken within thirty days from its rendition, will not be dismissed on motion, because the citation was not served for several months after the appeal was sued out.—*Moore v. Spier*, 129.
4. *Same; irregularity in waived by joinder in error.*—In such case, the appellee might, it seems, have had a affirmance on certificate, but the irregularity is waived by a joinder in error without objecting to it.—*Ib.* 129.
5. *Appeal from judgment of justice of the peace; how proved.*—The fact that an appeal was taken from a judgment rendered by a justice of the peace can not be proved by an entry of the word *appeal* on his docket.—*Steinhardt v. Bell*, 208.
6. *Appeal by married women, without security for costs.*—From any judgment or decree "subjecting to sale the separate estate of a married woman, or any part thereof," she may prosecute an appeal without giving security for the costs, on making an affidavit of her inability to do so (Code, § 3930); but the statute does not apply, where a married woman institutes a statutory claim suit to try the right to property on which an execution against her husband has been levied, and the issue is found against her. *Guy v. Lee*, 346.
7. *Abstract charge; when reversal worked by.*—An abstract charge, even though it assert a correct legal proposition, will work a reversal, when it may have misled the jury.—*Beek v. The State*, 1.
8. *Finding of the court upon testimony, not reviewed on appeal.*—In a prosecution for a misdemeanor, before the County Court, the case being submitted to the decision of the court without the intervention of a jury, its finding on the facts can not be reviewed, or revised, by this court, on appeal.—*Knowles v. The State*, 9.
9. *Security for costs; overruling of motion to dismiss suit for want of; when revisable.*—In an action brought by a corporation, or a non-

ERROR AND APPEAL—*Continued.*

- resident, the overruling of a motion to dismiss the suit, on account of a failure to give security for the costs, is not revisable on error or appeal, unless reserved by bill of exceptions.—*Hyde v. Adams*, 111.
10. *Same; when court can not revise charge or judgment in absence of.* The cause being submitted to the court on an agreed statement of facts, in which it is stipulated that the court shall, on the admitted facts, give a general charge in favor of either party, and render judgment as on verdict; that the party against whom he decides shall have an exception to the charge, and may prosecute an appeal; this court can not revise the charge or judgment, in the absence of a bill of exceptions properly signed.—*Clark v. McCrary*, 110.
 11. *A joinder in error without objecting to irregularity of the appeal.*—Is a waiver of such irregularity.—*Moore v. Spier*, 129.
 12. *An appeal lies.*—From a decree dismissing a motion to set aside a sale of land under execution on a decree in chancery.—*Allen v. Allen*, 154.
 13. *Demurrable defects in petition not available to appellant unless specified in demurrer.*—In a petition asking to set aside a sale of lands under execution, an averment that the land "was sold for a grossly inadequate price," if objectionable as the averment of a legal conclusion, is amendable; and the defect not being specified in the demurrer, nor called to the attention of the chancellor, is not available in this court.—*Ib.* 154.
 14. *Error without injury.*—Under a plea in abatement, averring residence and freehold in another county at the commencement of the suit, two issues being presented—namely, in what county the defendant resided, and whether he had estopped himself from setting up such residence by reason of admissions made to the plaintiff and his attorney; in such case, when the verdict of the jury affirmatively ascertains the fact of the defendant's residence in the county in which the suit was brought, then, though there may have been error in the charge of the court on the issue of estoppel, it is error without injury, and constitutes no cause for reversal.—*Raney v. Raney*, 157.
 15. *Interlocutory decree from which appeal lies; what is not.*—The overruling of a demurrer, to a petition to set aside a sale of land under execution, no other order being made in the case, is not one of the interlocutory decrees from which an appeal is given by statute (Code, §§ 3916, 3918, 3921-2); and an appeal from such decree will be dismissed, *ex mero motu*, by the court.—*Clark v. Spencer*, 345.
 16. *Appeal from interlocutory decree sustaining demurrer to cross-bill; when does not lie.*—An appeal does not lie from an interlocutory decree sustaining a demurrer to a cross-bill, without an order dismissing it; and such appeal will be dismissed by the court *ex mero motu*, notwithstanding a joinder in error.—(Overruling *Brooks v. Woods*, 40 Ala. 538).—*Barclay v. Spraggins*, 357.
 17. *Improperly sustaining demurrer to plea.*—The general rule is that injury results to the party against whom the error was made, when a demurrer is improperly sustained to a plea, and will operate a reversal; but, when it affirmatively appears that the party complaining has had, under the general issue or special pleas, all the benefits he could have had under the plea to which the demurrer was sustained, the error is not a cause of reversal.—*Owings v. Binford*, 421.
 18. *Remainderman necessary party.*—If a remainderman is not made a party to the suit, his rights are not affected by any decree that may be rendered; and if an infant remainderman is made a par-

ERROR AND APPEAL—*Continued.*

- ty, but is not properly brought before the court, the decree will be reversed on error, no matter how the question is presented. *Gayle et al. v. Johnston*, 395.
19. *Nonsuit; what is revisable.*—On appeal from a judgment of voluntary nonsuit (Code, § 3112), this court can only revise the rulings to which exceptions were duly reserved.—*Wartensleben v. Haithcock, et al.* 565.
 20. *Argument of counsel; objectionable language.*—In his argument to the jury, counsel has no right to refer to or comment on facts, or assumed facts, as to which there is no evidence before the jury; as by referring to the character of plaintiff's ancestors, or characterizing the defendants as a soulless corporation; and the use of such language being duly objected and excepted to, is a reversible error.—*Com. Fire Ins. Co. v. Allen*, 571.
 21. *Nonsuit; what is revisable.*—When a nonsuit is taken on account of a charge to the jury, to which exception was reserved (Code, § 3112), rulings on demurrer can not be considered on error. *Stoelker v. Wooten*, 610.

ESTATES OF DECEDENTS.

1. *When heirs may elect to claim profit arising from resale.*—When administrator entitled to be repaid.—The land having been resold by the administrator at a profit, the heirs may, at their election, claim the profit arising from the resale; but, if they so elect, the administrator is entitled to be repaid the purchase-money expended by him, and also to the rents and profits accruing up to the resale. *Powell v. Powell*, 11.
2. *Election must be in unambiguous terms.*—Such election, to be effective, must be clearly manifested, and declared in unambiguous terms; and in a bill which seeks to bring the administrator to a settlement, if the heirs desire to claim the profits of the resale, they must distinctly aver their election, and the facts on which it is based, or assert their claim before the register, before entering on a statement of the account. *Ib.* 11.
3. *When onus on administrator on final settlement, to show error in inventory.*—When an administrator returns in his inventory a debt due from himself to his intestate, and, on final settlement, contends that the debt was in fact paid to the intestate while living, the onus is on him to show that it was erroneously included in the inventory by mistake or otherwise; and in the absence of satisfactory explanation, he must be charged with the amount. *Dickie v. Dickie*, 57.
4. *When onus on distributees to disprove correctness of credit allowed on partial or annual settlement.*—A credit allowed on a partial or annual settlement being presumptively correct (Code, § 2531), the onus is on the distributees, on final settlement, to overcome this presumption; and in the absence of satisfactory evidence of its incorrectness, the credit must be allowed. *Ib.* 57.
5. *Administrator not credited with amount advanced distributee.*—On settlement of an administrator's accounts, he can not be allowed a credit for money advanced to a distributee, but the amount may be charged against the distributee, when his distributive share has been ascertained. *Ib.* 57.
6. *Confederate money; liability for; entitled to credit.*—An administrator who, during the late war, received Confederate treasury notes in good faith, in the course of administration, is only liable for its due and proper administration; and having exchanged for registered bonds the surplus remaining in his hands after paying off the debts, he is entitled to a credit for the amount so lost

ESTATES OF DECEDENTS—*Continued.*

- to the estate, when no fraud or collusion is charged against him, and there is no proof that he could have invested it in any other way. *Ib.* 57.
7. *Administrator's debt, when he is creditor of his intestate presumed paid up on receipt of assets.*—When an administrator, being a creditor of the intestate, receives assets which he can lawfully apply to the payment of debts, he is bound to make the application, and the debt will be presumed to be paid; and if he receives depreciated currency in payment of the debts of the estate, he is required to apply it in payment of his own debt. *Ib.* 57.
 8. *Note for slave—chargeable with value in good money at time of sale.* For the amount of a note given for the purchase-money of a slave, sold by the administrator under an order of court, he is *prima facie* chargeable in settlement, not for the amount specified in the note, but for the value of the property in good money at the time of the sale. *Ib.* 57.
 9. *Bill seeking sale of decedent's lands for payment of debts; proof as against infant defendants.*—When a bill seeks to sell a decedent's lands for the payment of debts, because of the insufficiency of personal assets, the existence of the debts and the deficiency of personal assets must be proved, as against infant defendants, by other evidence than the admissions of their guardian *ad litem*. *Hooper v. Hardie*, 114.
 10. *Testimony of party, as to transactions with decedent.*—The estate of a deceased tenant, who died in the possession of personal property which had been lent to him, is not interested in the result of a suit brought by the lender against the landlord, to recover damages for the conversion of such property (Code, § 3058), and therefore, in such action, the plaintiff may testify as to any relevant fact showing the bailment. *Butler v. Jones*, 436.
 11. *Sale of decedent's lands for distribution; when title of heirs is divested.* When a decedent's lands are sold for distribution, under an order and decree of the Probate Court, the title of the heirs is not divested until the purchase-money has been paid in full. *Gardner, Adm'r v. Kelso*, 497.
 12. *Parties to bill.*—When a bill seeks to enforce a vendor's lien for the unpaid purchase-money of land, which was sold for distribution among the heirs of the deceased owner, under a decree of the Probate Court, all the persons in whom the legal title was vested are necessary parties. *Ib.* 497.
 13. *Same; who are heirs and next of kin of deceased grandchild.*—The only son of a deceased daughter, who left neither child, father, mother, nor maternal grandmother, living at the time of his death, being one of the heirs at law of the decedent; it can not be assumed that his four maternal aunts are his only heirs and next of kin, when that fact is not averred, and it is not shown that he left no grandfather, nor maternal grandmother, nor maternal uncle or aunts. *Ib.* 497.
 14. *Same; personal representative of deceased heir.*—It being shown that a part of the purchase-money for the land was paid, and was distributed in unequal proportions among the several heirs; the personal representative of a deceased heir, who had received more than his proportion of the money, is a necessary party to the statement of the account; and being made a party, on his own motion, after the account has been taken, the register's report made, and on the day before the final decree was rendered, the decree will be reversed at his instance. *Ib.* 497.
 15. *Decree distributing purchase-money; settlement of decedent's estate.* Under such bill to enforce the vendor's lien, a decree distributing the unpaid purchase-money can not be rendered without a state-

ESTATES OF DECEDENTS—*Continued.*

ment of the accounts of the deceased administrator, who was the purchaser, and who had made unequal distribution among the heirs; and this cannot be done without a removal of the settlement of the estate from the Probate Court, under pleadings properly framed; nor can such removal be asked by the personal representative unless special equitable reasons are shown. *Ib.* 497.

16. *Testimony of party as to transaction with, or statement by deceased person.*—To disqualify a party from testifying as a witness, "as to any transaction with, or statement by any deceased person, whose estate is interested in the result of the suit, or when such deceased person, at the time of such statement or transaction, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is offered" (Code, § 3058), "there must be an immediate conflict of interest involved in the issue to be tried—the effect of the evidence must be to diminish or enlarge the rights of the decedent's estate." *Hill, Fontaine & Co. v. Helton*, 528.
17. *Title to lands descends to heirs and vests in them immediately upon the death of the person who is seized and possessed of a heritable estate therein.*—On the death of a person who is seized and possessed of a heritable estate in lands, the title at once descends and vests in his heirs or devisees, subject to the widow's rights of homestead and quarantine, and to the exercise by the administrator of the statutory powers conferred on him; and with the title the right of possession passes, and the right to the rents and profits accruing until they are intercepted by the administrator; nor can the administrator hold them responsible for the rents and profits thus received. *Gayle v. Johnson et als.*, 388.

ESTOPPEL.

1. *Estoppel; nature of, and when enforced.*—The doctrine of estoppel has its origin in good morals, and in considerations of good faith, and its underlying principle is, that declarations or admissions, express or implied, made for the purpose of influencing the conduct of another, if the designed effect ensues, are conclusive upon the party making them; but an estoppel, being in its nature defensive, will not be used to effectuate a gain, and will not be enforced further than is requisite to protection from injury. *Adler v. Pin et als.*, 351.
2. *Same; estoppel en pais; what does not operate as.*—Where an administrator demanded certain personal property as assets of his decedent's estate, and it was surrendered to him by the parties in possession without objection, or the assertion of any adverse title in themselves, and it was appraised and included in the inventory of the administrator and subsequently sold under an order of the Probate Court; but prior to the sale the parties notified the personal representative of their claim to the property and warned him not to sell the same: *Held*, in an action of trover against the administrator, that while the delivery of the property, without asserting title, was a strong admission, it did not constitute an estoppel when the defendant was notified of the claim before a sale, and in time to prevent injury. *Held*, further, that while the administrator incurred a *prima facie* liability by having the property appraised and returned in his inventory, such *prima facie* liability is not available to him as a defense in the present suit as he was not concluded by the appraisement or inventory, but could have so amended it as to omit the property on discovering that it did not belong to the estate. *Ib.* 351.
3. *When administrator is estopped.*—One of the heirs being appointed

ESTOPPEL—*Continued.*

administrator, and the moneys in the hands of the receiver being paid over to him by order of the chancellor, under an agreement among the several heirs, to be used and applied in payment of certain specified claims; the administrator will be personally estopped from denying that he had received the moneys for the specified purposes, and the heirs from denying his right to appropriate them according to the terms of the agreement; but the administrator can not be charged, on settlement of his administration, with the moneys thus received, as assets of the estate. *Gayle v. Johnson*, 388.

4. *Estoppel of widow by joining in deed with heirs.*—Where the widow unites with the heirs in a warranty deed conveying all the right, estate and interest of the grantors, and reciting that the consideration was paid to all of them, the equitable estate of the widow is merged in the legal estate conveyed by the heirs; and she will not be heard to gainsay the title of the grantees by asserting a claim to either dower or homestead. *Reeves v. Brooks*, 26.

EVIDENCE.

I. ADMISSIBILITY AND RELEVANCY.

1. *Secondary evidence of document beyond jurisdiction of court.*—Secondary evidence of the contents of a bill of lading may be received, when it is shown that the document is beyond the jurisdiction of the court, in the hands of a person residing in another State. *Young v. The East Ala. Railway Co.* 100.
2. *Contradictory statements by witness; when admissible.*—Previous contradictory statements or declarations by a witness, whether under oath or not are not admissible for the purpose of impeaching him, unless they relate to some matter material to the issue on trial. *Steinhardt v. Bell*, 208.
3. *Testimony to rebut inference attempted to be drawn in argument; when admissible.*—As a general rule, testimony should not be received merely to rebut an inference attempted to be drawn in argument, unless it be of some pertinent fact overlooked or omitted in submitting the evidence; but, in admitting evidence for this purpose, the court necessarily has a discretionary power in promotion of justice. *Ib.* 208.
4. *Confessions; when admissible.*—The confessions of one of the defendants in this case, made to the sheriff and his deputy while in their custody, and not obtained by threats or promises, or in any manner induced by the appliances of hope or fear, held to have been made voluntarily and therefore properly admitted. *Sands v. State*, 201.
5. *Declarations of husband acting as agent of wife.*—When the husband, acting as agent of the wife, makes declarations in regard to a partnership business, in which she is a member, such declarations or admissions being narrative only of a past transaction, are not legal evidence to fix a charge on her, or her estate. *Ward et al. v. Johnson*, 281.

Oral evidence of intention not admissible. See TRESPASS, 4 (291.)

6. *Admission of secondary evidence.*—Where secondary evidence is offered to show the contents of a deed alleged to have been lost, it is not enough to show that search was made for the original; there must be diligent search at every place the paper would be likely to be found. The execution of the instrument, as well as its loss must be shown. *Singer Manufacturing Co. v. Riley*, 314.

EVIDENCE—Continued.

7. *Same; when error to admit.*—It is error to permit an alleged copy of a lost deed to be read to a witness' that witness may testify in regard to the contents of the original, and whether said alleged copy corresponds with witness' recollection of the original. *Ib.* 314.
8. *Evidence on former trial; when admissible on subsequent trial, witness having died.*—The conditions on which the evidence of a deceased witness on a former trial may be reproduced on the trial of a subsequent suit, are that the matters in the issue, and the parties are essentially the same in both actions. Parties, as thus used, comprehend privies in blood, in law or in estate. *Patten v. Pitts*, 373.
9. *Same; nature of privity essential to admissibility.*—When, the other conditions existing, the admissibility of such evidence depends on the question, whether the parties to the two trials are privies in estate, there must be such privity as could make the judgment in the former evidence in the subsequent action. *Ib.* 373.
10. *When judgment against tenant evidence against landlord.*—A judgment against a tenant is not evidence against the landlord in a subsequent action for the recovery of possession, unless he had notice, or was admitted to defend, or did actually defend. *Ib.* 373.
11. *Privity in estate; what constitutes.*—To constitute one person a privy in estate to another, such other must be a predecessor in respect to the property in question, from whom the privy derives his title; a mutual or successive relationship of rights. *Ib.* 373.
12. *As to title, the grantees of landlord and tenant of landlord are strangers.*—The grantees of a landlord derive no title through him from a former tenant; for the purposes of title, they are entire strangers—evidence for or against the one, is therefore, inadmissible for or against the other. *Ib.* 373.
13. *Proof of agency.*—The fact of agency may be proved by circumstances, and may be inferred from previous employment in similar acts or transactions, or from acts of such nature and so continuous as to furnish a reasonable basis of inference that they were known to the principal, and that he would not have allowed the agent to so act without authority; but the fact that the agent performed similar acts for other persons in the neighborhood, in and about the same business, does not authorize the inference that he was authorized to perform such acts as agent for plaintiff. *Hill, Fontaine & Co. v. Helton*, 528.

II. ADMISSIONS; DECLARATIONS; HEARSAY; RES GESTÆ.

14. *Whether liquor sold was intoxicating, may be shown by its effects on those using it.*—In a prosecution for selling intoxicating liquor, in violation of a local prohibitory law, a witness for the prosecution having testified, that the liquor or beverage sold by the defendant, produced on him effects similar to those produced by whisky, it is competent for the defendant to prove by other witnesses who had drunk it, that it had no intoxicating effect on them. *Knowles v. The State*, 9.
15. *Proof of declaration of intestate in action against administrator.* The statutory exclusion of testimony as to transactions with, or statements by, a deceased person, whose estate is interested in the result of the suit (Code, § 3058) extends to both the adversary parties; and where the effect of the testimony of an administrator as to declarations made by his intestate, explanatory of his possession of certain property, would be to increase the assets of the estate, such testimony is not admissible against the opposing party. *Adler v. Pin et als.* 351.

EVIDENCE—Continued.

16. *When copies of original entries are admissible.*—When a book containing original entries, which are competent evidence, is shown to be beyond the jurisdiction of the court, copies of them shown to be correct, are admissible. *Elliott v. Duche, 376.*
17. *When oral proof of written transfer received.*—The fact that a transfer of judgments and claims was made, though in writing, may be proved by parol; though secondary evidence of the contents can not be received, unless the absence of the writing is accounted for. *Ib. 376.*
18. *Testimony of party as to transaction with, or settlement by deceased person.*—To disqualify a party from testifying as a witness, "as to any transaction with, or statement by any deceased person, whose estate is interested in the result of the suit; or when such deceased person, at the time of such statement or transaction, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is offered" (Code, § 3058), "there must be an immediate conflict of interest involved in the issue to be tried—the effect of the evidence must be to diminish or enlarge the rights of the decedent's estate." *Hill, Fontaine & Co. v. Helton, 528.*
19. *Declarations of agent; admissibility of, as evidence against principal.* The declarations of an agent, made during the continuance of the agency, and while in the discharge of his duties as agent, respecting a transaction then depending, and so contemporaneous with the main fact as to constitute a part of the *res geste*, are binding on the principal, and admissible as evidence against him; but this rule does not apply to declarations which are merely narrative of a past transaction, or which do not appear to relate to the subject of the particular agency. *Ib. 528.*
20. *Confessions; when admissible.*—The confessions of one of the defendants in this case, made to the sheriff and his deputy while in their custody, and not obtained by threats or promises, or in any manner induced by the appliances of hope or fear, held to have been made voluntarily and therefore properly admitted. *Ib. 528.*
21. *Same; recital in mortgage as indicating acquiescence in application of payments previously made.*—In an action on two notes, each secured by a separate mortgage, a question being as to the application of partial payments arising from the proceeds of sale of the mortgaged property—whether on the notes thereby secured, or on an unsecured debt—a recital in the second mortgage as to the balance remaining unpaid on the note secured by the first, is competent evidence for the plaintiff, as showing an admission by the defendant that the previous payments had been properly applied.—*Taylor & Co. v. Cockrell, 236.*
22. *Oral evidence of intention in deed.*—It is error to admit oral testimony of the intention with which a deed is executed. *Morris v. Robinson, 291.*
23. *When copies of original entries are admissible.*—When a book containing original entries, which are competent evidence, is shown to be beyond the jurisdiction of the court, copies of them, shown to be correct, are admissible.—*Elliott v. Duche, 376.*
24. *When oral proof of written transfer received.*—The fact that a transfer of judgments and claims was made, though in writing, may be proved by parol; though secondary evidence of the contents can not be received, unless the absence of the writing is accounted for.—*Ib. 376.*
25. *Conduct and language of prosecutor connected with arrest; when admissible as tending to establish malice.*—In an action for a malicious prosecution, it is competent for the plaintiff to show any acts, conduct or words of the defendant on the day of the plaintiff's ar-

EVIDENCE—*Continued.*

- rest, and while he was in custody, tending to establish malice or other improper motive in the prosecution, or a purpose to vex or oppress the plaintiff; but, the defendant not being liable for any acts or declarations of the sheriff, beyond the usual and proper mode of executing the process, unless he instigated, authorized or participated in them, the declarations of the sheriff to the plaintiff, not made in the presence of the defendant, are not competent evidence for the plaintiff. *Motes v. Bates*, 382.
26. *Indictment not evidence of probable cause.*—The finding of an indictment by a grand jury is not *prima facie* evidence of probable cause. *Ib.* 382.
27. *Confession, admissions and consent, as evidence.*—On grounds of public policy, a divorce will not be granted by consent of parties, by collusion between them, nor on their confessions or admissions, express or implied; and a sworn answer only puts in issue the allegations of the bill.—*Powell v. Powell*, 595.
28. *Hearsay inadmissible.*—While the plaintiff may prove the nature of a dangerous surgical operation, to which he was subjected in consequence of the injuries received by him, as circumstances to be considered in determining his anxiety and suffering, he can not be allowed to testify to what the surgeon said to him at the time, such declarations being mere hearsay.—*Ala. G. S. R. R. Co. v. Arnold*, 600.

III. BURDEN OF PROOF; WEIGHT AND SUFFICIENCY.

1. *Burden of proof as to payment of purchase-money.*—Under a bill to enforce a vendor's lien on land, while the *onus* of proving payment may be on the defendant, the recital of payment in the conveyance makes out a *prima facie* case, and shifts on the complainant the *onus* of rebutting or overcoming it.—*Jenkins v. Matthews*, 486.
2. *Vendor's lien; proof as to non-payment of purchase-money.*—Where the conveyance recites payment of the purchase-money, and it is not shown that any notes were executed by the purchaser at the time it was delivered, a vendor's lien will not be declared on vague or doubtful testimony; the proof must be sufficient to enable the court satisfactorily to determine, not only the fact that the purchase-money is unpaid, but also its amount; and when uncertainty and conflict as to material facts exist, and the defendant's version of the transaction is sustained by disinterested witnesses, a lien will not be declared.—*Ib.* 486.
3. *Burden of proof as to consideration; charge misplacing burden of proof.*—When an attachment is levied by a creditor on goods claimed by a purchaser from his debtor, and his debt antedates the sale or conveyance, the *onus* is on the purchaser to prove the consideration paid by him; but, when the record shows that this was proved, and there was no conflicting evidence, a charge misplacing the burden of proof is error without injury.—*Ellis v. Allen, Bush & West*, 575.
4. *Extent of agent's authority.*—Authority to an agent to ship cotton, and forward bills of lading to the consignees, does not include or imply authority to receive advances on the cotton from the consignees; and while authority to ship and sell may imply authority to receive the proceeds of sale, it does not confer authority to appropriate the proceeds of sale to the payment of the agent's individual debt.—*Hill, Fontaine & Co. v. Helton*, 528.
5. *Burden of proof.*—When an affirmative fact is averred, on which the title to relief is founded, and is denied, the burden of proof rests on the complainant, and it is incumbent on him to produce a sufficiency of evidence to satisfy the mind.—*Long v. Gill*, 408.

EVIDENCE—Continued.

IV. OBJECTIONS.

1. *Objections to evidence.*—When evidence is correctly admitted, as offered, though objected to, the subsequent introduction of other evidence can not render that ruling erroneous, but another objection must be interposed, based on such additional evidence. *Hill, Fontain & Co. v. Helton, 528.*

V. PAROL AND WRITTEN.

See ORAL TESTIMONY, p. 51.

1. *Oral stipulation; when admissible.*—While a written contract can not be contradicted or varied by parol evidence, it is permissible where the writing does not purport to set out the entire contract, to show by parol other stipulations not inconsistent with those expressed.—*Powell v. Thompson, 51.*
2. *Written contract under which rights of parties to be determined; refusal to require production of when the record shows plaintiff had it in court a reversible error.*—As held in this case on the former appeal (67 Ala. 504), the plaintiff's should be required to produce the written contract with Robbs Brothers under which the timber was felled, and by which the relative rights of the parties are to be determined; and the refusal to require the production of this paper, when the record shows that the plaintiff had it in court, is a reversible error.—*Street v. Nelson, 230.*
3. *Written conveyance not varied by parol reservation.*—A deed absolute in its terms, passes a fee simple estate *in presenti* taking effect on delivery; and its legal effect can not be varied by a reservation in parol, so as to make the estate conveyed commence *in futuro*. *Wright v. Graves, 416.*

VI. PRIMARY AND SECONDARY.

1. *Proof of loss of note.*—In an action on a promissory note, secondary evidence of its contents may be received, on the testimony of the plaintiff that he had not seen it since it was used in a former chancery suit, proof of search by his solicitor in that suit among his papers, and by the register in chancery of search among the papers on file in his office.—*Katzenberg v. Lehman, 512.*
2. *Secondary evidence of lost deed.*—As to the alleged deed from Cothran & Elliott to Cadow, the court holds, as on the former appeal (78 Ala. 150), that the proof of its existence and destruction was sufficient to let in secondary evidence of its execution and contents. *Elliott v. Dyche et als, 376.*
3. *Proof of deed executed in another State.*—As to a deed executed in Georgia, the presumption is that the subscribing witnesses also resided there; and it is not necessary to produce them, nor to account for their absence, before adducing secondary evidence of its execution. *Ib. 376.*
4. *What not statement of opinion.*—When a witness testifies to the existence and subsequent destruction of a deed which he has seen and read, and further states, "The paper writing now shown me is, I verily believe, a true copy of said deed," this is not the statement of a mere opinion, and does not render his testimony inadmissible. *Ib. 376.*
5. *Secondary evidence of document beyond jurisdiction of court.*—Secondary evidence of the contents of a bill of lading may be received, when it is shown that the document is beyond the jurisdiction of the court, in the hands of a person residing in another State. *Young v. E. Ala. Railway Co, 100.*

EVIDENCE—Continued.

6. *Admission of secondary evidence.*—Where secondary evidence is offered to show the contents of a deed alleged to have been lost, it is not enough to show that search was made for the original; there must be diligent search at every place the paper would be likely to be found. The execution of the instrument, as well as its loss must be shown.—*Ib.* 100.
7. *Same; when error to admit.*—It is error to permit an alleged copy of a lost deed to be read to a witness, that witness may testify in regard to the contents of the original, and whether said alleged copy corresponds with witness' recollection of the original. *Singer Mfg Co. v. Riley*, 314.

RECORDS.

1. *Admissibility of record to show that mortgage was recorded; failure to show probate no objection to admissibility.*—In an action to recover the statutory penalty for a failure to enter satisfaction of a mortgage on the record, within three months after payment, and request in writing (Code, §§ 2222-3), the record is admissible to show the fact that the mortgage was recorded; and the failure to show its probate is no objection to the admissibility of the evidence. *Steiner Bros. v. Snow*.
2. *Permissible to show when entry of satisfaction was made.*—The record showing an entry of satisfaction, it is permissible to show that it was in fact made after the commencement of the suit. *Ib.*

EXECUTION.

1. *Execution issued after death of plaintiff.*—An execution issued after the death of the plaintiff therein is void, and all proceedings taken under it are void; hence, the plaintiff's attorney, who controlled the execution, and who knew the fact of her death, can not claim compensation for the collection of the money under it. *Smith v. Alexander*, 251.
2. *Money in custody of court intrusted to solicitor on his giving bond therefor; proper mode of compelling payment.*—When money in the custody of the court is allowed to go into the hands of a solicitor, on his giving bond to keep it subject to the order of the court, and to pay it as the court may direct, he may be compelled to pay over the money by the summary process of attachment, of which he should have notice, and an opportunity to show cause against the order. But the court has no power to order a summary execution against the sureties on his bond. *Dudley v. Witter*, 51 Ala. 456, overruled. *Ib.*
3. *Chancellor may entertain motion to set aside sale of lands, under execution issued on decree, while appeal pending in this court.*—Pending an appeal in this court, from a decree rendered in a chancery case, the chancellor has no power of jurisdiction to render any further decree affecting the rights and equities of the parties; but, having the power, common to courts of law and equity, to prevent the abuse of its process, he may entertain a motion to set aside a sale of land under execution issued on the decree. *Allen v. Allen*, 154.
4. *Action on note containing waiver of exemption.*—When a waiver of exemptions is claimed, in an action on a note, it must be alleged in the complaint, and may be specially controverted; and, when controverted, the special issue must be found in favor of the plaintiff, or the waiver can not be incorporated in the judgment. *Taylor & Co. v. Cockrell*, 936.

EXECUTION—*Continued.*

5. *No execution can issue on decree foreclosing mortgage, until after sale of mortgaged property, and balance ascertained.*—By statutory provision (Code, § 3908), when an account is taken under a bill in chancery, and the amount of indebtedness between the parties ascertained by the decree of the court, the decree has the force and effect of a judgment, and execution may at once issue on it; but, on a decree for the foreclosure of mortgages, or the enforcement of equitable liens, "no execution must issue until the property ordered to be sold shall have been sold, and the sale confirmed, and the balance due ascertained by the decree of the court." *Presley, Adm'x, v. McLean, 309.*
6. *Same; form of levy, and interest of purchaser.*—A judgment creditor of the mortgagor may levy his execution on the equity of redemption only, or on the land generally, not designating the interest of the mortgagor; the purchaser acquiring, in the former case, only the equity of redemption, and being estopped to deny the validity of the mortgage; and in the latter, the entire interest of the mortgagor, whether the mortgage is valid or invalid, paid or outstanding. *Gassenheimer, Adm'x, v. Mollon, 521.*

EXECUTORS AND ADMINISTRATORS.

1. *When onus on administrator on final settlement, to show error in inventory.*—When an administrator returns in his inventory a debt due from himself to his intestate, and, on final settlement, contends that the debt was in fact paid to the intestate while living, the *onus* is on him to show that it was erroneously included in the inventory by mistake or otherwise; and in the absence of satisfactory explanation, he must be charged with the amount. *Dickie et al. v. Dickie, Adm'r, 57.*
2. *When onus on distributees to disprove correctness of credit allowed on partial or annual settlement.*—A credit allowed on a partial or annual settlement being presumptively correct (Code, § 2531), the *onus* is on the distributees, on final settlement, to overcome this presumption; and in the absence of satisfactory evidence of its incorrectness, the credit must be allowed. *Ib. 57.*
3. *Administrator not credited with amount advanced distributee.*—On settlement of an administrator's accounts, he can not be allowed a credit for money advanced to a distributee, but the amount may be charged against the distributee, when his distributive share has been ascertained. *Ib. 57.*
4. *Confederate money; liability for; entitled to credit.*—An administrator who, during the late war, received Confederate treasury notes in good faith, in the course of administration, is only liable for its due and proper administration; and having exchanged for registered bonds the surplus remaining in his hands after paying off the debts, he is entitled to a credit for the amount so lost to the estate, when no fraud or collusion is charged against him, and there is no proof that he could have invested it in any other way. *Ib. 57.*
5. *Administrator's debt, when he is creditor of his intestate presumed paid up on receipt of assets.*—When an administrator, being a creditor of the intestate, receives assets which he can lawfully apply to the payment of debts, he is bound to make the application, and the debt will be presumed to be paid; and if he receives depreciated currency in payment of the debts of the estate, he is required to apply it in payment of his own debt. *Ib. 57.*
6. *Note for slave—chargeable with value in good money at time of sale.* For the amount of a note given for the purchase-money of a slave, sold by the administrator under an order of court, he is *prima*

EXECUTORS AND ADMINISTRATORS—*Continued.*

- facie* chargeable in settlement, not for the amount specified in the note, but for the value of the property in good money at the time of the sale. *Ib.* 57.
7. *Balance decreed against administrator on first settlement who resigns and becomes his own successor ; distributees may charge sureties on either the first or second bond.*—When an administrator, having resigned, afterwards becomes his own successor, and a balance is decreed against him on settlement of the first administration, the distributees may, at their election, charge the sureties on either the first or the second bond. *Modawell v. Hudson*, 265.
 8. *Representation of infant distributee on final settlement of guardian ad litem.*—When an infant distributee is represented on final settlement of an administrator's accounts, by a guardian *ad litem* regularly appointed, the decree is as binding on him as if he were an adult. *Ib.* 265.
 9. *Final settlement of administrator's accounts ; when an estate not ready for settlement and distribution, decree must be rendered against him in favor of the succeeding administrator de bonis non.*—On final settlement of an administrator's accounts, when the estate is not ready for settlement and distribution, a decree against him must be rendered in favor of the succeeding administrator *de bonis non* (Code, § 2595) ; and if he has been appointed his own successor, the probate court has, ordinarily, no jurisdiction to make the settlement. *Ib.* 265.
 10. *Settlement by administrator, who is his own successor, of both administrations, &c. ; when sureties on first bond can not be charged.* If the administrator is summoned to settle both administrations on the same day, and a balance is first ascertained against him on the statements of the accounts of the first administration, which, at the instance of the distributees, is carried as a debt into the second, they can not afterwards, by bill in equity, charge the sureties on the first bond with the amount of this balance, on the ground that the court, by reason of the antagonistic positions occupied by the administrator, had no jurisdiction of the first settlement. *Ib.* 265.
 11. *An administrator purchasing a decree against his estate,—when enures to the benefit of estate ; when entitled to credit.*—If an administrator purchase a decree which is a debt or charge against the estate, at less than the amount due on it, the benefit of the purchase enures to the estate, but he is entitled to be reimbursed the amount of his private funds used in making the purchase. *Powell v. Powell*, 11.
 12. *When heirs have a right to claim the benefit of a purchase of the estate lands by the administrator.*—The decree having been rendered under a bill foreclosing a vendor's lien on land, and the administrator becoming the purchaser of the land at the sale under the decree, prior to his purchase of the decree ; the right of the heirs to claim the benefit of the latter purchase, as being made for the estate, is independent of their right of election to claim the benefit of the former. *Ib.* 11.
 13. *Execution against executor or administrator in representative character ; when may issue against him individually.*—After the issue of an execution against an executor or administrator in his representative character, and its return "no property found" on a decree in the Chancery Court, as on a judgment at law, an execution may be issued against him individually ; nor is it necessary that another execution, to be levied *de bonis testatoris* should be sent to the county in which he was appointed. *Allen v. Allen*, 154.
 14. *Personal trust under will ; when executor invested with.*—Where the

EXECUTORS AND ADMINISTRATORS—*Continued.*

testatrix appointed her husband as the executor of her will, giving him a life-estate in all the property, with remainder to their children, giving also to him a discretionary power to sell and re-invest, and relieving him from giving bond; *held*, that a personal trust was created, which did not attach to the executorial office, but was limited to the donee of the power. *Proctor v. Scharpff*, 227.

15. *Proof of declarations of intestate in action against administrator.* The statutory exclusion of testimony as to transactions with, or statements by, a deceased person, whose estate is interested in the result of the suit (Code, § 3058), extends to both the adversary parties; and where the effect of the testimony of an administrator as to declarations made by his intestate, explanatory of his possession of certain property, would be to increase the assets of the estate, such testimony is not admissible against the opposing party. *Adler v. Pin et als.*, 351.
16. *Executor's power to sell under will.*—When the will confers on an executor "full power to purchase or sell any property he may think necessary or proper, * * or to dispose of any property for the benefit of the estate," the power of sale is not limited to lands in which the testator had a present right of possession and enjoyment, but includes also an estate in remainder or reversion. *Hairston v. Dobbs*, 589.
17. *Title of purchaser from executor.*—If an executor, having power under the will to sell, sells and conveys in payment of his individual debt, and fails to account for the money on settlement, this does not affect the legal title of the purchaser; and if the devisees have any remedy, it is to recover the purchase-money as unpaid. *Ib* 589.
18. *Administrator without interest can not purchase at his own sale.* When an administrator has no interest in the estate which he represents, he can not become, either by himself, or jointly with another person, the purchaser of lands sold by himself under a probate decree, but such sale is voidable at the election of the heirs or devisees seasonably expressed; and the confirmation of the sale by the Probate Court does not prevent the application of the equitable doctrine. *McMillan v. Rushing*, 402.
19. *Account; bill for, legatees and devisees against administrator of estate declared and settled as insolvent; what necessary to be shown.* To sustain a bill by legatees and devisees, against the administrator of an estate which has been declared and settled as insolvent, for an account of property specially devised and bequeathed to them, they must show that, on a proper accounting, after paying all the debts properly filed against the insolvent estate, assets will remain to which they are entitled. *Ib* 402.
20. *Liability of administrator for rents and hires during late war, 1861-65.*—On final settlement of the accounts of a deceased administrator, who kept the estate together during the late war (1861-65) without an order of court, the distributees electing to charge him with rents of the lands and the hire of the slaves, while the court will enforce the cardinal rule, which requires administrators to act in good faith, and to exercise that degree of skill and diligence which a prudent man uses in the management of his private affairs of similar nature, it will deal leniently where good faith is shown, having due regard to the disturbed condition of the country, and the difficulties and embarrassments resulting therefrom to the management and preservation of estates; and will neither compel a strict and exact accounting, nor, when the estimates of the several witnesses differ, adopt the

EXECUTORS AND ADMINISTRATORS—*Continued.*

highest value of the rents and hires as the measure of liability. *Clark, Adm'r, v. Eubank, et als., 584.*

21. *Allowance of attorney's fees to administrator.*—An administrator should be allowed reasonable attorney's fees paid to counsel, when necessary for his own protection or that of the estate, as determined by the character of the services and the value of the estate; and also for services rendered on the final settlements of his accounts, except as to items which are successfully contested by the heirs and distributees; but, if he claims a credit for the entire compensation of counsel for services rendered on the settlement, when some of the items are successfully resisted by the heirs, the entire credit may be rejected. *Ib. 584.*
22. *Liability of administrator for rents; to distributees and to creditors.* An administrator is chargeable with the rent of lands, which he failed to collect by reason of the insufficiency of the sureties on the note taken by him, unless it is shown that he used due diligence to ascertain their solvency and sufficiency; but, if it appears that the estate had been declared insolvent, that the creditors were present at the public renting, and informed him that the sureties were good, they can not charge him with the rents thereby lost; nor can the distributees, in such case, unless such charge creates a surplus for distribution after the debts have been paid. *Ib. 584.*

EXEMPTIONS.

1. *Action on note containing waiver of exemption.*—When a waiver of exemptions is claimed, in an action on a note, it must be alleged in the complaint, and may be specially controverted; and, when controverted, the special issue must be found in favor of the plaintiff, or the waiver can not be incorporated in the judgment. *Taylor & Co. v. Cockrell, 236.*
2. *Same; evidence sufficient to entitle complainants to decree.*—The only evidence being that of the debtor himself, who testifies that, at the time the mortgage was executed, he owned no other land than his homestead, besides the tract conveyed by the mortgage, and that his personal property was not worth one thousand dollars, this is sufficient to entitle the complainants to a decree. *Ordway & McGuire v. White, &c., 244.*

FIXTURES.

1. *No rule defining when chattel loses its character as such and becomes a fixture.*—Different rules prevail, dependent on the relation of the parties, whether of grantor or grantee, landlord and tenant, or executor and heir, and also upon the uses for which the things are intended, whether for the purpose of agriculture, or trade or manufacture. *Tillman v. DeLacy, 103.*
2. *Same.*—As between mortgagor and mortgagee, the same rules prevail substantially, as between vendor and vendee. There is no material difference whether the chattel is attached before or after the execution of the mortgage—except stronger evidence of intention to annex is required where the chattel is placed subsequent to the execution of the mortgage. *Ib. 103.*
3. *Requisites to convert chattel into a part of the realty*—are: 1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Application to the use or purpose to which that part of the realty, with which it is connected, is appropriated. 3d. The intention of the party making the annexation to make a permanent accession to the freehold. *Ib. 103.*

FIXTURES—*Continued.*

4. *Same.*—It may be regarded as a settled rule, that any chattel permanently annexed to the freehold, and which can not be severed without material injury to the premises, becomes a part of the realty, irrespective of the intention with which it was attached. *Ib.* 103.
5. *Relaxation of the rule.*—It may be required by the future growth and extension of manufacturing industries, that the requisite of physical attachment in or to the soil, be relaxed to the extent that the question of fixtures *vel non* shall depend on the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act. *Ib.* 103.
6. *Permanency of attachment; how determined.*—The permanency of the attachment does not depend on the strength, or force, or manner of the annexation to the freehold so much as upon its constancy, and upon the uses to which the attached chattel is adapted, the purposes for which designed, and the intention of the party in attaching it. *Ib.* 103.
7. *Tendency of modern decisions.*—The current of modern decisions is in favor of viewing everything as a fixture which has been attached to the realty, with a view to the purposes for which it is held or employed, however slight or temporary the connection between them. *Ib.* 103.
8. *Case at bar.*—In the case at bar the intention must control, the onus being on the plaintiff to show that the mortgagor intended that the engine should be a permanent accession to the freehold. *Ib.* 103.

FORCIBLE ENTRY AND DETAINER.

1. *Stipulation in lease for continuance of possession after expiration of term.*—When a written lease contains a stipulation, that the lessee may, after the expiration of the term, "continue to occupy by the month," but does not bind him to do so, each party has an equal right, after the expiration of the term, to put an end to the tenancy by the month, by giving reasonable notice. *McDevitt v. Lambert*, 536.
2. *What is reasonable notice.*—In the absence of statutory regulations, if a lease contains no provision as to the notice necessary to put an end to the tenancy, reasonable and sufficient notice is "the interval between the times of payment of rent, or the length of time by which the letting was first measured;" and when the tenancy is by the month, a month's notice must be given. *Ib.* 536.
3. *Statutory notice, or demand in writing.*—The statutory notice, or demand in writing, which is necessary to the maintenance of an action of unlawful detainer (Code, § 3697), is distinct from the notice which, in case of a tenancy by the month, is necessary to put an end to the tenancy, and terminate the defendant's rightful possession; and this statutory notice can not be given while the defendant is in rightful possession. *Ib.* 536.

FRAUDS, STATUTE OF.

1. *Statute of frauds as to contracts for sale of land; acceptance by attorney.*—In a bill to enforce a vendor's lien, alleging that the defendant's election to purchase, under the option reserved to him by the contract, was manifested by a letter written by his attorney, it is not necessary to allege that the attorney had written authority to accept; and the averment that he was "duly authorized" not being denied, no question arises under the statute of frauds.—*Linn v. McLean*, 360.

FRAUDULENT CONVEYANCES.

1. *Conveyance by embarrassed or insolvent debtor to creditor ; validity as against other creditors.*—A bona fide creditor, knowing that his debtor is embarrassed, or insolvent even, may use extraordinary haste in collecting his demand, to the extent of purchasing everything the debtor has, leaving nothing for other creditors ; but he must pay a reasonably fair price for the goods or property purchased, and secure no benefit to the debtor which the law would not give him in the absence of the contract. *Leinkauff & Strauss v. Frenkle & Co.*, 136.
2. *Same.*—In this case, the creditor's demand being \$5,700, and he purchasing the debtor's entire stock of goods at the gross sum of \$6,200, of which he paid \$1,000 in cash, leaving \$500 of his debt unsatisfied ; these facts bring the case within the principle settled in *Levy v. Williams*, 79 Ala. 171, and stamp the transaction as fraudulent. *Ib.* 136.

HUSBAND AND WIFE—PARTNERSHIP.

3. (*On application for rehearing.*) *Recital, in conveyance, of partnership of husband and wife, the grantors ; coverture of wife no obstacle to decree condemning partnership property.*—The complainant suing as creditors of the mercantile partnership of S. A. M. & Co., alleged to consist of S. M. and his wife, and seeking to set aside, on the ground of fraud, a sale and conveyance of their entire stock of goods by said partnership ; the bill of sale, which was made an exhibit to the bill, and in which the partnership was described as consisting of the husband and wife, is sufficient proof of the fact of partnership, as against the unsworn answers of the defendants, averring that the business belonged to the wife alone ; and the fact of the partnership being established, the coverture and incapacity of the wife, one of the partners, is no obstacle to the decree condemning the goods as the property of the partnership. *Ib.* 136.
4. *Sale by insolvent debtor to creditor ; validity as against other creditors.* A sale of property by a failing or insolvent debtor, at a fair and adequate price, in absolute payment of an honest debt, no benefit whatever being reserved to himself, will be sustained by the courts, as a valid exercise of his right of preference, although he thereby disabled himself to pay his other creditors, and may have intended to defraud them ; yet, if it was shown that the purchasing creditor knowingly participated and intentionally aided the debtor in other transactions, which proximately preceded his failure in business, it would possibly be different. *Tryon v. Flournoy & Epping*, 321.
5. *Unrecorded absolute conveyance, intended only as security for loan ; validity as against creditors.*—A conveyance absolute in form, but intended only as a security for a loan, as shown by a bond with condition to convey on payment of the debt, the papers not being recorded, and no change of possession being shown, is constructively fraudulent as against existing creditors ; but, as against subsequent creditors, a fraudulent intent, or actual fraud, must be shown. *Ib.* 321.
6. *Same ; ignorance of law, as excuse for failure to record ; concealment of contents of deed.*—If the creditor, being a resident of Georgia, was ignorant of the fact that the laws of Alabama required registration of such conveyance and defeasance, and for this reason failed to have it recorded until after the lapse of nine or ten months, this would be sufficient to rebut any fraudulent intent on his part ; nor can he be charged with a fraudulent intent,

FRAUDULENT CONVEYANCES—*Continued.*

because the debtor, when acknowledging the conveyance, attempted to conceal its contents. *Ib.* 321.

7. *Fraud.*—On the facts shown by the record, the court so far concurs with the chancellor in the conclusion that the mortgage attacked for fraud is not shown to have been executed with any fraudulent intent on the part of the mortgagor; or, if it was, that the mortgagee participated in such fraudulent intent. *Lawson v. Ala. Warehouse Co.*, 341.
8. *False recital a badge of fraud; may be explained.*—But a false recital in a mortgage, as to the consideration, or indebtedness intended to be secured, is only a badge of fraud, and is susceptible of explanation; and where the indebtedness is recited to be \$5,000, as in this case, but it is shown that \$2,800 only was loaned at the date of the mortgage, and the residue (\$2,200) was to be advanced at times, and in sums, to suit the mortgagee's convenience, this is a sufficient explanation, and relieves the instrument of any imputation of fraud. *Ib.* 341.
9. *Bill to set aside fraudulent conveyance; when not multifarious.*—Under the rule against multifariousness, several distinct matters wholly unconnected, or several defendants against whom the complainant asserts separate demands, the case of each defendant being entirely distinct in its subject-matter from that of the others, can not be joined in the same bill; but, in the application of this rule to particular cases, the court necessarily exercises a discretion, endeavoring to avoid a multiplicity of suits, on the one hand, and not to involve a party in oppressive and expensive litigation in which he has no interest, on the other. *Burford v. Steele*, 147.
10. *Fraud; when averment of, sufficient.*—While a general charge of fraud, without a statement of the facts on which it is founded, is not sufficient, it is not necessary that all the facts and circumstances shall be minutely alleged; a general averment of facts from which, unexplained the conclusion of fraud arises, is sufficient. *Ib.* 147.
11. *Same; bill for; when fraudulent grantees of husband may be joined as defendants.*—Fraudulent grantees, to whom the husband has transferred his property in fraud of the complainant's right of maintenance, may be joined with him as defendants to such a bill; and the bill is not multifarious because they claim under several conveyances executed with the same common intent. *Hinds v. Hinds*, 225.

GAMING.

See CRIMINAL LAW.

GARNISHMENT.

1. *Judgment against garnishee, and payment thereof, as defense to action.*—When a garnishee, against whom a judgment has been rendered by a justice of the peace, sets up the payment thereof in defense of an action by a claimant of the condemned debt, mere irregularities in the judgment do not invalidate it, if the justice had jurisdiction of the subject-matter and the parties; but, his jurisdiction being purely statutory, his authority to render the judgment must affirmatively appear.—*Edwards v. Levison*, 447.
2. *Same; notice to adverse claimant, and contest with him.*—If the garnishee, admitting his possession of money, states that it is claimed by a third person, the proceedings against him must be

GARNISHMENT—*Continued.*

suspended, and a notice issued to such third person to appear and contest with plaintiff the right to the money (Code, §§ 3302-03); and if, instead of such notice, the plaintiff sues out a garnishment against such third person, and contests his answer, this amounts to an abandonment or discontinuance of the proceeding against the former garnishee, and is available to him as a defense against a judgment; and if a judgment is wrongfully entered by the justice against both of the garnishees, which is reversed on appeal by the second, but is paid by the first, such payment is no defense to an action against him by the other. *Ib.* 447.

GUARDIAN AND WARD.

1. *Same.*—Where a ward has obtained a decree against his guardian on final settlement, he may maintain a bill against the surviving surety on the guardian's official bond, jointly with the personal representative of the deceased surety, to enforce satisfaction out of their property; and the surviving surety having executed two mortgages on his property, on successive days, both mortgagees may also be joined as defendants, under allegations of fraud and want of consideration.—*Burford, Adm'r, v. Steele*, 147.
2. *Infants not included in the statute of non-claim.*—Infants are not included in the statute of non-claim (Code, § 2598), but they are allowed eighteen months after attaining majority to present their claims; and the fact that an infant has a guardian, who may and should act for him, does not exclude him from the benefit of this exception.—*Ib.* 147.
3. *Guardian's settlement; requisite proceedings.*—A settlement of the guardian's accounts in the Probate Court, made during the minority of the ward, before the resignation of the guardian, and without the appointment of a guardian *ad litem*, is void for want of jurisdiction; and a decree in chancery removing the ward's disabilities as an infant, fraudulently procured by the guardian, imparts no validity to the settlement.—*Cox v. Johnson et al.* 22.
4. *Ward suing guardian after attaining majority to avoid settlements made.*—A bill in equity filed by a ward within twelve months after attaining majority, seeking to compel a settlement of the accounts of his guardian, and to set aside conveyances executed by him to his guardian during his minority, based on a void settlement rendered by the Probate Court, is neither multifarious nor wanting in equity.—*Ib.* 22.
5. *Final settlement of guardian's accounts; when Probate Court has not jurisdiction.*—The Probate Court has no jurisdiction to make a final settlement of a guardian's accounts during the minority of the ward, and while the legal relation between them still exists. *Glass v. Glass*, 241.
6. *Same; (this case.)*—Where the record shows that the guardian's accounts for final settlement were filed on the 14th November, and his resignation filed on the 14th January afterwards, on which day also a final settlement of his accounts was made with the court, the settlement is void, and can not be supported on the principle of retrospective relation.—*Ib.* 241.

HOMESTEAD.

See CHANCERY.

1. *Conveyance of homestead by married man without signature and assent of wife.*—An absolute conveyance of his homestead by a married man, without the voluntary signature and assent of his

HOMESTEAD—*Continued.*

wife, is a nullity, and an executory agreement to convey is equally null and inoperative.—*Striplin & Co. v. Cooper & Son*, 256.

2. *Same; lien of bond as against homestead.*—The lien created by the official bond of a tax-collector, as declared by statute (Code, § 403), extends to the homestead owned and occupied by him at the time of the execution of the bond, and is operative as against subsequent purchasers with notice. (CLOPTON, J., *dissenting.*) *Schuessler v. Dudley*, 547.

HUSBAND AND WIFE.

See FRAUDULENT CONVEYANCES, 3.

1. *Power of wife over rents, income and profits of her equitable separate estate.*—As to the rents, income and profits of the wife's equitable estate, she is entitled to receive and control them herself, without any interference on the part of her husband, but she may give them to him, as she might to any other person; and if, while they are living together, she allows him to receive the rents, income and profits, without objection, a gift to him will be presumed, and she can not charge his estate after death. *Allen, Exr., v. Allen*. 180.
2. *Same; liability of husband's estate to account for use and occupation of wife's house.*—As to the rents and dividends of the wife's property actually received by the husband in this case, the proof showing that she always claimed them, and that he admitted her claim, and promised to pay it, she is entitled to a decree against his estate; but as to the husband's liability for the use and occupation of the wife's house, in common with her and the other members of their family, if such claim could be allowed in any case, "it would require much clearer and stronger proof than is shown in this case." *Ib.* 180.
3. *Husband's power over wife's statutory estate.*—The statutory separate estate of the wife can not be bound by any act of the husband, except to the extent of the statute making it liable for "articles of comfort and support of the household, &c." § 2711, Code. *Ward et al. v. Johnson*, 281.
4. *Earnings and services of wife during coverture.*—The earnings and personal services of the wife, during coverture, presumptively belong to the husband, though he may relinquish them in her favor, except as against his existing creditors; and when the wife attempts to enforce in equity, after the death of the husband, a contract for her own benefit, the consideration of which was personal services rendered by her during coverture, she must allege and prove a relinquishment in her favor, and that the husband left no debts, or that his debts have been paid. *Bohman v. Overall*, 451.
5. *Remedy at law.*—There is no adequate remedy at law, in favor of the persons named as legatees in such testamentary paper, on account of the failure of the promisor to carry out its provisions; and the jurisdiction of equity is maintainable on the grounds of fraud, trust, and specific performance. *Ib.* 451.
6. *Mortgage by husband, on crops to be raised on wife's land.*—The husband may, by mortgage or otherwise, anticipate the crops to be raised on lands belonging to the wife's statutory estate, when necessary to procure supplies, teams, implements, or other things essential to carrying on farming operations. *Boyett & Wimberly v. Potter*, 476.

HUSBAND AND WIFE—*Continued.*

7. *Earnings of wife and minor son.*—The earnings of the wife during coverture, and the earnings of an unemancipated son, alike belong to the husband and father; his renunciation of his rights, in favor of his wife, is void as against his existing creditors; and it is subject to revocation, and is revoked by a mortgage executed before the consummation of the gift by delivery; as where the subject of the gift is the crops to be raised by the labor of the wife, and they are mortgaged by him before they are planted. *Ib.* 476.
8. *Same; (this case).*—Where the owner of a homestead, having made an executory sale, in which his wife did not join, afterwards removed from the premises, and an attachment was then levied on the land; a purchaser at the sheriff's sale, under the judgment in the attachment sale, acquires a title which must prevail over that of an assignee of the title-bond, to whom a conveyance was executed after the levy of the attachment. *Striplin & Co. v. Cooper & Son*, 256.
9. *Declarations of husband acting as agent of wife.*—When the husband, acting as agent of the wife, makes declarations in regard to a partnership business, in which she is a member, such declarations or admissions being narrative only of a past transaction, are not legal evidence to fix a charge on her, or her estate. *Ward et al. v. Johnson, et al.* 281.
10. *Mortgage of wife's statutory estate a nullity.*—A mortgage by a married woman of her statutory separate estate, to secure the debt of her husband, is a nullity. *Bergan v. Jeffries*, 349.
11. *Same; a bill to enjoin suit on, without equity.*—A bill to enjoin a suit on such mortgage is without equity, there being a good and perfect defense to the action at law. *Ib.* 349.
12. *Same; fraud does not give jurisdiction.*—The fact that a fraud may have been perpetrated on the wife, would not give jurisdiction, without some other ground of equitable cognizance, where there is a plain and adequate remedy at law. *Ib.* 349.

INFANTS.

1. *Relieving minors of disability; impeaching equity decree.*—In relieving minors of the disability of infancy (Code, §§ 2735–41) the Chancery Court exercises a special and limited jurisdiction, and its decrees stand on the same footing as the judgments of courts of limited and inferior jurisdiction, whose recitals of notice or appearance may be impeached and contradicted, in a collateral proceeding, by extrinsic evidence. *Cox v. Johnson*, 22.
2. *Same; requisites of petition.*—When the infant has a guardian, the petition asking to be relieved of the disabilities of non-age must be signed by the infant in person, and the guardian must join in the petition; and if signed by the guardian, in the name of the infant, but without his knowledge or consent, the decree founded on it is a fraud on the jurisdiction of the court, which the court will set aside on a direct proceeding, or, without setting it aside, will prevent the guardian using it against the infant. *Ib.* 22.
3. *Decree based on admissions of guardian ad litem; when infants may file bill of review.*—If the record shows that the decree was founded only on the admissions of the guardian *ad litem* of the infants, they may file a bill of review within three years after attaining their majority; and the proceedings will be reversed back to the pleadings, in order that a hearing may be had on legal evidence. *Hooper v. Hardie*, 114.
4. *Infants not included in the statute of non-claim.*—Infants are not included in the statute of non-claim (Code, § 2598), but they are

INFANTS—*Continued.*

allowed eighteen months after attaining majority to present their claims; and the fact that an infant has a guardian, who may and should act for him, does not exclude him from the benefit of this exception. *Burford v. Steele*, 147.

5. *Laches not imputed to infant; when election seasonably expressed.* As a general rule, *laches* will not be imputed to an infant; and where several children, seeking to set aside a purchase of lands by an administrator at his own sale, file their bill within two years after the eldest had attained his majority, their election is seasonably expressed. *McMillan v. Rushing*, 402.
6. *Minors; how brought before the court.*—When the complainant is the father of an infant defendant, whose mother is dead, service of process should be made on her general guardian, if she has any; and if process is served on the person who is averred to be her guardian, but the bill is not sworn to, and there is no affidavit of the fact that he is such guardian, and no proof of the fact, the infant is not properly before the court. *Gayle v. Johnston*, 395.

INSURANCE.

1. *Insurance; warranty and representations distinguished.*—In a contract of insurance, a warranty is part and parcel of the contract itself, is in the nature of a condition precedent, and, whether material to the risk or not, must be strictly complied with, or literally fulfilled, before the assured can recover on the policy; while a representation, not being of the essence of the contract, but relating to something collateral or preliminary, and in the nature of an inducement to it, though false, does not avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by the agreement of the parties. *Ala. Gold Life Ins. Co. v. Johnston*, 467.
2. *Same.*—The mere fact that a statement is referred to, or even inserted in the policy itself, is not now considered conclusive of its nature as a warranty; but whether it is to be construed as a warranty, or as a representation merely, depends rather on the form of the expression, the apparent purpose of its insertion, and its conviction with other parts of the application and policy, construed together as one entire contract. *Ib.* 467.
3. *General rules of construction.*—Among the settled rules for the construction of policies of insurance are these: (1) that all the conditions and obligations of the contract will be construed liberally in favor of the assured, and strictly against the insurer, (2) that the clearest and most unequivocal language is necessary to create a warranty, and all statements of doubtful meaning will be construed as representations merely; (3) that even though a warranty in name or form be declared by the terms of the contract, its effect may be modified by other parts of the policy, or of the application, including the questions and answers, so that answers to questions not material to the risk will be construed as warranting only their honesty and good faith. *Ib.* 467.
4. *Case at bar.*—In this case, the contract containing inconsistent expressions, one part tending to show an intention to make the answer warranties, and another treating them as representations merely, the court holds (1) that the answers are not absolute warranties, but are in the nature of representations, or, if warranties, only of an honest belief of their truth; (2) that any untrue statement or suppression of fact material to the risk will vitiate the policy, and thus bar a recovery, whether intentional or within the knowledge of the party or not; (3) that such statement of an immaterial fact, though untrue, will not avoid the

INSURANCE—*Continued.*

- policy, unless the party knew it was false, or was negligently ignorant; and (4) that the inquiries as to the symptoms of disease were not intended to be absolutely material, unless they had existed in such appreciable form as would affect soundness of health, or have a tendency to shorten life. *Ib.* 467.
5. *Proof of payment of premiums.*—When a creditor files a bill in equity, to reach and subject to the satisfaction of his debt the proceeds of a policy of insurance on the life of the deceased debtor in favor of one of his children, and the answers deny that the premiums were paid by the debtor, while the *onus* of proving payment is on complainant, positive proof is not required, but it may be established by circumstantial evidence; nor is it incumbent on him to show the sources from which the debtor derived the money. *Fearn, Ex'r v. Ward, Adm'r, 555.*
 6. *Policy of insurance by debtor, in favor of child, considered as voluntary conveyance at suit of creditors.*—A policy of insurance procured by a debtor on his own life, in favor of one of his children, not being within the protection of the statute (Code, §§ 2733-4), is a mere voluntary conveyance, and is void as against his existing creditors, though no fraud may have been intended. *Ib.* 555.
 7. *Policy of insurance by debtor, in favor of child, considered as conveyance on valuable consideration.*—When a father, being indebted to one of his children, procures a policy of insurance on his own life in her favor, as security for, or in payment of his indebtedness, the transaction will be sustained against the attack of his other creditors, as being founded on valuable consideration, provided the limit of reasonable adequacy and sufficiency be not exceeded; but the relation of debtor and creditor does not exist between them, because he is indebted, as executor, to the estate of his deceased father, which was bequeathed to him and his mother equally, while his daughter is a legatee under the will of his deceased mother. *Ib.* 555.
 8. *Policy of life insurance; nature of contract.*—A policy of life insurance is not a contract of insurance for a single year, with the right or privilege of renewal annually, or as each premium becomes due and is paid; but is a single and entire contract, having its inception in the issue of the policy, continuing during the life of the assured (or other term), and payable at death, but subject to be discontinued by the non-payment of premiums as agreed. *Ib.* 555.
 9. *Same; extent of creditor's right to subject.*—After the death of the debtor, having procured a policy of insurance on his own life in favor of one of his children, an existing creditor may reach and subject in equity, not only the premiums paid by the debtor, but the proceeds of the policy to the extent of the debt; and the money having been loaned out on note and mortgage, by the guardian of the infant, the creditor may pursue it, and make the mortgage available for his own benefit. *Ib.* 555.
 10. *Representation as to interest of insured in property.*—The erection of a party wall, by agreement between the insured and the vendee of the adjoining premises, running up two stories high on the wall of the insured property, does not show that the interest of the insured in his property is "other than the entire, unconditional, and sole ownership," as stated in answer to questions; especially when the agent of the insurer, through whom the policy was effected, lived in the town where the property was situated, and must have known its condition. *Com. Fire Ins. Co. v. Allen, 571.*
 11. *Agency in procuring policy.*—An agent of the insurance company, through whom a policy is effected, can not be considered in any

INSURANCE—*Continued.*

- sense as the agent of the insured, in any matter connected with the issuing of the policy. *Ib.* 571.
12. *Waiver of proof of loss and notice.*—When the insurance company, on being notified of a loss, at once offers to pay a specific sum, denying liability for some of the articles as not being covered by the policy, this is a waiver of the preliminary proof of loss, and authorizes the insured to sue at once, without waiting for the lapse of sixty days provided for in the policy. *Ib.* 571.
 13. *Construction of policy as to fixtures included or excepted.*—A policy insuring a brick store against fire, containing an exception of "fences and other yard fixtures, side-walks, store furniture and fixtures," covers a wooden shed or awning in front of the building, supported on pillars sunk in the ground, with rafters extending into the brick wall; but the shelving in the house, and an office enclosed with railing in one corner of the interior, are "store fixtures" within the meaning of the exception. *Ib.* 571.
 14. *Same; clause providing for repairs.*—When the policy contains a clause giving the insured the option to repair within a reasonable time, and he claims the benefit of it, this is not a full defense to an action on the policy, unless by the repairs the property is made as serviceable and valuable as before the fire. *Ib.* 571.
 15. *Same; measure of damages.*—When the policy provides that the cash value of the property destroyed or damaged shall not exceed what would be the cost to the assured of replacing it, and, in case of depreciation from use or otherwise, a suitable deduction shall be made from the cost of repairing; the measure of damages would be the cost of repairs, if thereby the property is rendered as valuable as it was before; if less valuable than before, then the difference must be added to the cost; and if more valuable, it must be deducted. *Ib.* 571.
 16. *Tender.*—A tender of less than the amount claimed, conditioned on a receipt in full being signed, and not accompanied by the payment of the money into court (Code, § 2997), is not good. *Ib.* 571.

JUDGMENTS AND DECREES.

1. *Conclusiveness of judgment.*—The purchaser having brought an action at law against his vendor, alleging full payment of purchase-money and the failure or refusal of the vendor to make titles according to the condition of his bond, and judgment on verdict being rendered for the defendant; while such judgment is not conclusive as to the amount due, it is conclusive of the fact that something is due; and on bill afterwards filed by the purchaser to compel a specific performance, alleging full payment of the purchase-money, while the judgment at law is unreversed and in full force, although the evidence adduced before the register may show full payment before the judgment was rendered, he must report that a nominal sum was due. *Heard v. Pulaski*, 502.
2. *Appeal from justice's judgment when sum claimed exceeds twenty dollars; formation of issue.*—On appeal from a justice's judgment when the sum claimed exceeds twenty dollars, the cause must be tried "on an issue to be made up under the direction of the court (Code, § 3122); but it is not necessary that the record should show the active interference of the court in the formation of the issue, when not requested; and it will be presumed, when pleas to the merits are found in the record, that the cause was tried on them without objection. *Jones v. Collins*, 108.

JUDGMENTS AND DECREES—Continued.

3. *Same*.—Where a ward has obtained a decree against his guardian on final settlement, he may maintain a bill against the surviving surety on the guardian's official bond, jointly with the personal representative of the deceased surety, to enforce satisfaction out of their property; and the surviving surety having executed two mortgages on his property, on successive days, both mortgagees may also be joined as defendants, under allegations of fraud and want of consideration. *Burford, Adm'r, v. Steele, 147.*
4. *Relief in equity against judgment at law, or decree of Probate Court, on the ground of fraud*.—To justify relief in equity against a judgment at law, or decree of the Probate Court, on the ground of fraud, the alleged fraud must have been practiced in the rendition or procurement of the judgment, and it is not sufficient to show fraud in antecedent transactions, which would have constituted a good defense against the judgment. *Watts v. Frazer, 186.*
5. *Scire facias; when not granted*.—After the lapse of eight years from the sale and its confirmation, during which period no action is had or asked in the cause, the suit is at an end, and the decree can neither be revived by *scire facias*, nor made the basis for a second decree, ascertaining the balance due, on which execution may issue. *Presley, Admr'x, v. McLean, 309.*
6. *Service of summons on defendants*.—No valid judgment can be rendered against a party not before a court, and, on appeal, the record must reasonably show that the defendant was served or appeared. Where the record does not disclose the fact, inquiry must be addressed to the proper construction of the judgment entry. *Owings v. Binford, 421.*
7. *Construction of judgment recitals*.—The recitals of the judgment may be sufficient to bring in parties without service, and this construction will be placed upon them if necessary to preserve the verity of the record; but, if the recitals are consistent with the hypothesis that they did not appear, and the maintenance of the verity of the records does not require such construction, no intendment will be indulged in favor of the appearance. *Ib. 421.*
8. *Case at bar*.—In the case at bar the name of each defendant is set out in the margin; the recitals are "*came the parties by attorneys;*" a judgment is rendered against all the defendants, *each being specially named in the judgment*. The necessary construction is that all appeared. *Ib. 421.*
9. *Revision of judgment of Selma City Court, under special statute*.—In reviewing a judgment of the City Court of Selma, rendered by the court without the intervention of the jury, (Sess. Acts, 1875-6, p. 390, § 14), this court is not allowed to indulge any presumption whatever in favor of its findings on the evidence. *Butler v. Jones, 436.*
10. *Judgment against garnishee, and payment thereof, as defense to action*.—When a garnishee, against whom a judgment has been rendered by a justice of the peace, sets up the payment thereof in defense of an action by a claimant of the condemned debt, mere irregularities in the judgment do not invalidate it, if the justice had jurisdiction of the subject-matter and the parties; but, his jurisdiction being purely statutory, his authority to render the judgment must affirmatively appear.—*Edwards v. Levishon, 447.*
11. *Same; notice to adverse claimant, and contest with him*.—If the garnishee, admitting his possession of money, states that it is claimed by a third person, the proceedings against him must be suspended, and a notice issued to such third person to appear and contest with plaintiff the right to the money (Code, §§

JUDGMENTS AND DECREES—*Continued.*

3302-03; and if, instead of such notice, the plaintiff sues out a garnishment against such third person, and contests his answer, this amounts to an abandonment or discontinuance of the proceeding against the former garnishee, and is available to him as a defense against a judgment; and if a judgment is wrongfully entered by the justice against both of the garnishees, which is reversed on appeal by the second, but is paid by the first, such payment is no defense to an action against him by the other. *Ib.* 447.

12. *Plea of former judgment in bar; replication and evidence.*—In trover for the conversion of cotton seed, a former judgment being pleaded in bar, in which a set-off was claimed on account of the value of the cotton seed, it is competent for the plaintiff to show that, on the former trial, under the evidence and the rulings of the court thereon, the claim of set-off was disallowed, because the plaintiff in the action had an unsatisfied lien on the cotton seed; and a replication averring these facts is a good answer to the plea. *Haas v. Taylor*, 459.

JURISDICTION.

1. *Jurisdiction of justice of the peace under statute against cruelty to animals.*—Justices of the peace have not final jurisdiction of offenses committed in violation of the statute against "cruelty to animals," (approved, February 23, 1883,—Sess. Acts 187—amended, February 17, 1885,—Sess. Acts 156,) there being nothing in either statute which confers such jurisdiction. *Horton v. The State*, 8.
2. *Same; when order of sale void and the sale a nullity.*—If the jurisdiction of the court never attached, the order of sale is void, and the sale a nullity; and the remedy at law to recover the land being plain and adequate, the heirs can not come into equity to set aside the sale. *Watts v. Frazer*, 186.

LANDLORD AND TENANT.

1. *Landlord has lien on entire crop grown on rented lands, whether grown by tenant himself or sub-tenant.*—The landlord has a lien on the entire crop grown on the rented lands, for the rent of the current year, whether it be grown by the tenant himself, or by a sub-tenant; and when a bale of cotton is placed by the sub-tenant at the gin-house, and set apart for the landlord in satisfaction of his claim for rent, the title of the landlord is thereby perfected, and he may maintain trover against any one who afterwards converts the cotton.—*Steinhardt v. Bell*, 268.
2. *Ratification not binding unless made with full knowledge of all material facts.*—A subsequent ratification of the unauthorized conversion, by the landlord, if made with full knowledge of all the material facts, is a complete defense to the action; but the burden of proof as to such ratification is on the defendant, and any evidence tending to prove or disprove the landlord's knowledge of any material facts is relevant and competent. *Ib.* 208.
3. *A waiver by landlord of lien for current year no waiver of other lien.* A waiver by a landlord, of his lien, in favor of another, for advances to be made his tenants to enable them to make a crop the current year, does not operate a waiver of the landlord's lien in favor of an antecedent debt of the tenant, except by consent of the landlord. *Napier v. Foster*, 339.
4. *Tenants in common; use and occupation.*—At common law, a tenant in common was not liable to his co-tenant for use and occu-

LANDLORD AND TENANT—*Continued.*

- pation, unless there was an actual eviction, or an agreement to pay rent; and the English statute (4th and 5th Anne) changing the rule, having been enacted after the settlement of this country, is not of force with us. *Gayle v. Johnson*, 395.
5. *Same; account for rents received.*—For rents actually received one tenant in common is liable to account to his co-tenant; but, when the rents were received from a tenant to whom necessary advances to make a crop were supplied, such advances, and other necessary costs and expenses incurred, must be deducted from the gross amount received. *Ib.* 395.
 6. *Written conveyance not varied by parol reservation.*—A deed absolute in its terms, passes a fee simple estate *in presenti*, taking effect on delivery; and its legal effect can not be varied by a reservation in parol, so as to make the estate conveyed commence *in futuro*. *Wright v. Graves*, 416.
 7. *Tenancy at will.*—A parol gift of lands, or an unexecuted parol contract of purchase accompanied with possession, creates a tenancy at will. *Ib.* 416.
 8. *A lease made with a tenant at will* constitutes a person making it, when let into possession, a sub-lessee who is precluded to deny the right or title of his lessor at the time of making the lease; but, if not let into possession, he may show that the contract of lease is invalid because unsupported by a sufficient legal consideration. *Ib.* 416.
 9. *Tenancy by sufferance.*—A tenant for life can not make a lease to continue longer than his own estate, unless the remainderman joins. If the lessee of the tenant for life is in possession at the time of his death, and continues to hold over, he becomes a tenant by sufferance; but, if the lessee is not in possession, or does not hold over, a mere recognition of a lease previously made does not constitute such tenancy. *Ib.* 416.
 10. *Written agreement not extended by parol.*—A tenant having given his note or written obligation for the rent, specifying a certain number of bales of cotton, it is not permissible to show by parol that he also agreed to deliver a certain quantity of cotton seed. *Powell et al. v. Thompson*, 51.
 11. *Custom; when can not alter written agreement.*—The landlord, suing in case for the conversion of his tenant's crop, whereby his statutory lien was lost, can not be allowed to "prove that it was a rule or custom he had made on his plantation that he should have all the cotton seed raised on the land by his tenants;" because one man can not establish a custom, and because such evidence contradicts the terms of the note for rent., which specified that a certain number of bales of cotton should be delivered as rent. *Ib.* 51.
 12. *When joint action will lie; when not.*—If the cotton was converted by the wrongful act of the tenant himself, co-operating with the other defendants, who had notice of the landlord's rights, a joint action for the wrongful act may be maintained against all of them; but, if the wrongful act of each was separate and distinct, a joint action can not be maintained against them. *Ib.* 51.
 13. *When sureties on replevy bond are jointly liable with their principal.* While the removal of the tenant's crop from the rented premises, without the consent of the landlord, and without paying the rent, is *prima facie* a wrongful act, tending to the destruction of the landlord's lien; yet it may be justified by proof of legal right or lawful excuse, as by showing that it was replevied by the tenant after attachment levied at the suit of the landlord, and after the expiration of the tenancy and the tenant's removal from the rented premises; but, if such replevy, was made, not in good

LANDLORD AND TENANT—*Continued.*

- faith for the preservation of the cotton, but with the intention to waste and convert it, and the sureties on the bond had notice of such wrongful intent, they are liable for the conversion jointly with their principal. *Ib.* 51.
14. *When judgment against tenant evidence against landlord.*—A judgment against a tenant is not evidence against the landlord in a subsequent action for the recovery of possession, unless he had notice, or was admitted to defend, or did actually defend. *Patton et als. v. Pitts et als.*, 373.
 15. *As to title, the grantees of landlord and tenant of landlord are strangers.*—The grantees of a landlord derive no title through him from a former tenant; for the purposes of title, they are entire strangers—evidence for or against the one, is therefore inadmissible for or against the other. *Ib.* 373.
 16. *Attachment by landlord of the mortgagor; mortgagee can not maintain trespass on account of the levy.*—If the attachment was sued out by the landlord of the mortgagor, who had furnished the mortgaged property as advances to make a crop, his lien is superior to the mortgage, and the mortgagee can not maintain trespass on account of the levy. *Dunlap & Steele v. Vandegrift*, 424.
 17. *Landlord's remedy against purchaser of tenant's crop, whereby statutory lien is destroyed.*—A special action on the case lies in favor of the landlord, against a purchaser of the tenant's crop with notice of the landlord's statutory lien, whereby the lien was lost and destroyed; but a prior waiver of his lien by the landlord, in favor of the purchaser, is a defense to such action. *Stoelker v. Wooten*, 610.
 18. *Same; agreement waiving lien.*—An agreement between the landlord and a merchant who had made advances to the tenants, taking mortgages on their crops and stock, and who was unwilling to make additional advances for the next ensuing year without a waiver of the landlord's lien in his favor; by which it was stipulated that the landlord would waive his lien, that the accrued rents for the year might be applied to the merchant's debts, that he would continue to make advances for the ensuing year, but limited to actual necessities, under the supervision of the landlord's agent, at actual cost with interest added, and that he would, at the end of the year, transfer his mortgages to the landlord, on payment of the several debts due him,—such agreement is an absolute and unconditional waiver of the landlord's lien for the past year, but the waiver as to the ensuing year is conditional, being dependent on the performance of the stipulated acts by the merchant; and these conditions not having been performed, the agreement is no defense to an action by the landlord for the sale of the cotton raised by the tenants during that year. *Ib.* 610.

LARCENY.

SEE CRIMINAL LAW.

LICENSE.

1. *A license not a contract.*—But is a permit revocable at the will of the legislature; and where a license has been granted to sell spirituous liquors, and a valid election is afterwards had, resulting in favor of prohibition, it operates to revoke the license, and to convert what is otherwise a lawful business into a criminal offense. *Miller v. Jones*, 89.
2. *The proceedings to obtain an election under the act approved December 11th, 1884,* create a new, limited and special jurisdiction, not covered by the grant of general jurisdiction to the probate courts, *Ib.* 89.

LIEN.

SEE EXECUTION; LANDLORD AND TENANT; VENDOR AND PURCHASER; MECHANIC'S.

1. *Amendment of complaint; claim of lien for taxes paid.*—When the purchaser of lands at a sale for unpaid taxes brings an action to recover the possession, and the sale is held invalid on any ground except that the taxes were not in fact due and unpaid, he may have judgment for the amount paid by him, with subsequent taxes, and statutory penalty, which constitutes a lien on the land (Sess. Acts, 1878-9, p. 8); and when it becomes apparent, from the rulings of the court during the trial, that this suit must fail, he has a right to amend his complaint by making the statutory statement and claim. *Wartensleben v. Haithcock* 565.

LIMITATIONS, STATUTE OF, AND NON-CLAIM.

SEE TRUSTS AND TRUSTEES.

1. *When statute of limitation begins to run in favor of stockholders.*—When the terms of subscription bind the stockholders to pay the amount subscribed by them respectively, "in such installments as may be called for by said company, and one per cent. at the time of subscription;" and the corporation, becoming embarrassed, executes a deed of assignment for the benefit of creditors, not having called in all the stock subscribed; the statute of limitations in favor of the stockholders, as to their unpaid subscriptions, does not begin to run from the date of the assignment, but from the time when, under a bill filed by creditors, a decree is afterwards rendered by a court of equity making an assessment and call for the unpaid subscriptions. *Glenn v. Semple*, 159.
 2. *Statute of non-claim; what defense of may be taken by demurrer.*—The defense of the statute of non-claim may be taken by demurrer, when the bill seeks to enforce a demand which is *prima facie* within the statute and does not aver presentation, nor state facts which avoid the bar. *McDowell v. Brantley*, 173.
 3. *When statute of non-claim begins to run.*—Under a bond executed by a trustee appointed by the register in chancery, conditioned for the faithful performance of his duties, a liability does not accrue to the beneficiaries against the sureties until there has been a default by their principal, and the statute of non-claim (Code, § 2597) does not begin to run until such default. *Ib.* 173.
 4. *Statute of limitations; new action commenced within twelve months after reversal of former judgment.*—By express statutory provision (Code, § 3235) a new action may be commenced within twelve months after the reversal of a judgment in a former action, notwithstanding the lapse of time otherwise sufficient to effect a bar; and if the statute of limitations is pleaded to the new action, a replication setting up the former action, reversal, &c., is sufficient. *Napier v. Foster*, 379.
- Same; when former action was vexatious, or instituted during pendency of another.*—This statute is remedial, and must be liberally construed; and though the former action was instituted while another was pending on the same cause of action, and was characterized by this court as vexatious and oppressive, notwithstanding the premature commencement of the first, this does not avoid the replication, nor take the case out of the statutory exception. *Ib.* 379.

MANDAMUS.

1. *Repleader; when award of, equivalent to granting new trial; application for mandamus.*—Where issue is joined on several insufficient special pleas and on the general issue, and there is a general verdict for the defendant on all the issues; while the bill of exceptions, purporting to set out all the evidence, shows that the plaintiff made out a *prima facie* case, and that the defendant's evidence only supported the insufficient pleas; the award of a repleader, if not technically correct, is the same in substance as granting a new trial, with leave to amend the pleadings, and accomplishes substantial justice. *Ex parte, Pearce, 195.*
2. *Award without order of court; no appeal from.*—An award made by arbitrators in a cause pending in the Circuit Court, without an order of said court, will not be entered as the judgment of the court; and an appeal from the action of the judge, in refusing to enter it as such, is unauthorized by the statute, and will not lie. *Ex parte Bell, 372.*
3. *Mandamus refused on the authority of Ex parte Dudley, 79 Ala. Ib. 372.*
4. *Judgment for costs, on joint conviction of two or more defendants.* When two or more persons are jointly indicted for a felony, jointly tried and convicted, whether a joint judgment is rendered against all, or a separate judgment against each, each is liable for the entire costs; though but one payment can be enforced, and, in the event of unequal payments, contribution may be recovered as between themselves. *Dawson v. Sayre, 444.*
5. *Same; apportionment of costs.*—In joint prosecutions, there may be cases in which the court should not tax the entire costs against the defendants who are convicted, including the costs of witnesses for those who are acquitted; but, when all are convicted, and the whole costs are adjudged against each, the clerk has no authority to apportion the costs among them, thereby reducing the amount in each case to less than \$150, and require the president of the board of inspectors of convicts to deliver his certified statement of the costs to the contractor to whom the convict is assigned and delivered, and who is required to pay to the clerk the full amount of the costs so certified, not exceeding \$150 in one case. *Ib. 444.*

MARRIED WOMEN.

See CHAN. PL. AND PRAC., 18.

1. *Contracts of married woman having separate estate.*—A married woman, having a separate estate (which is presumed to be statutory, in the absence of averment and proof to the contrary) can not bind it or herself by a testamentary paper as an irrevocable contract, though she has power to execute a will. *Bolman v. Overall, 451.*
2. *Presumption as to character of wife's estate.*—In the absence of averment and proof to the contrary, property held by a married woman is presumed to be held as a statutory estate. *Boyet & Wimberly v. Potter, 476.*
3. *Bill in equity against married woman relieved of disabilities of coverture; when husband not necessary party; when bill not multifarious.*—When a bill seeks to enforce against a married woman, who has been relieved of the disabilities of coverture, the specific performance of a contract for the sale of land, and joins as a defendant another married woman, also relieved of the disabilities of coverture, on an allegation that the former had subsequently

MARRIED WOMEN—*Continued.*

sold the same land to her, the husband of neither defendant is a necessary or proper party; and if the bill also seeks the settlement of a partnership between the complainant and the husband of the second defendant in carrying on a mill business on the land, as to which the husband only is proper party defendant, it is multifarious. *Bayzor v. Adams*, 239.

4. *Action by married woman on note payable to herself.*—In an action by a married woman in her own name, on a promissory note payable to herself, plea averring that the note "was given for certain accounts transferred to plaintiff directly by her husband," but not averring that the transfer was made during coverture, does not negative the fact that the note is held as part of her statutory estate, and is fatally defective. *Wofford et al. v. Baker*, 303.
5. *Earnings and services of wife during coverture.*—The earnings and personal services of the wife, during coverture, presumptively belong to the husband, though he may relinquish them in her favor, except as against his existing creditors; and when the wife attempts to enforce in equity, after the death of the husband, a contract for her own benefit, the consideration of which was personal services rendered by her during coverture, she must allege and prove a relinquishment in her favor, and that the husband left no debts, or that his debts have been paid. *Bolman v. Over*. *Id.*, 451; also, *Boyet & Wimberly v. Potter*, 476.

MALICIOUS PROSECUTION.

See CRIMINAL LAW.

MECHANICS' LIEN.

1. *Mechanics' lien; when court of equity has no jurisdiction to enforce.* A mechanic's lien is created by statute, which also prescribes the remedy for its enforcement, in many respects analogous to a bill in chancery, or a proceeding *in rem* (Code, §§ 3440-49); and a court of equity can not take jurisdiction to enforce this lien, "in the absence of some special ground of equitable interposition, such as would render inadequate the remedy at law." *Walker v. Daimwood & Norris*, 245.

MORTGAGES.

1. *Admissibility of record to show that mortgage was recorded; failure to show probate no objection to admissibility.*—In an action to recover the statutory penalty for a failure to enter satisfaction of a mortgage on the record, within three months after payment, and request in writing (Code, §§ 2222-3), the record is admissible to show the fact that the mortgage was recorded; and the failure to show its probate is no objection to the admissibility of the evidence. *Steiner & Bro. v. Snow*, 45.
2. *Permissible to show when entry of satisfaction was made.*—The record showing an entry of satisfaction, it is permissible to show that it was in fact made after the commencement of the suit. *Ib.* 45.
3. *No particular form of request necessary.*—No particular form of words is necessary to constitute a sufficient request, if it informs the defendant with reasonable certainty that performance of the statutory duty is desired. *Ib.* 45.

MORTGAGES—*Continued.*

MORTGAGE OR CONDITIONAL SALE.

4. *Whether conveyance absolute in form is a conditional sale or mortgage; character of evidence.*—When the controversy is whether a conveyance, absolute in form, was intended as an unconditional sale or as a mortgage, the evidence must be clear and convincing to overcome the terms of the writing; but, where the controversy is whether it was intended as a conditional sale, with a reservation of the right to repurchase, or as a mortgage, a court of equity leans to the latter construction. *Douglass v. Moody et al.* 61.
5. *Same; intention of both parties must be shown.*—The concurring intention of both parties must be shown, before the transaction can be established and treated as a mortgage; and if it appears that the defendant considered and intended it as a conditional sale, though the complainant intended it as a mortgage, this does not make a "doubtful case," nor require the court to adopt the complainant's construction. *Ib.* 61.
6. *Same; indicia of mortgage, when not conclusive.*—The fact that the negotiations between the parties originated in an application for a loan of money, is regarded as one of the principal indicia of a mortgage; but, when it is shown that the application for a loan was repeatedly declined, and, after the negotiations were broken off, the defendant's proposal of a conditional sale was accepted, the weight of that circumstance is destroyed. *Ib.* 61.
7. *Same.*—Great disparity between the price paid and the value of the property, is also one of the indicia of a mortgage; but, when it is shown that the property was not in demand at the time, its value being prospective and speculative, a subsequent advance in its value, arising from unforeseen and adventitious circumstances, can not be considered in this connection. *Ib.* 61.

MORTGAGEE—WHEN CAN MAINTAIN EJECTMENT, 116.

8. *Mortgagee; when legal title in.*—A mortgagee has the legal title, and the right of immediate possession, unless the instrument contains a stipulation postponing his right of possession. *Grandin v. Hurt*, 116.
9. *Effect of stipulations in mortgage, on mortgagee's right to maintain ejectment (this case).*—The mortgage having been given to secure the payment of a note which the mortgagor had assigned to the mortgagee, and containing a stipulation that the latter should not "institute any proceeding to foreclose," until the maker and indorser had been sued to insolvency, the right to take possession is postponed until the happening of this contingency; and the mortgagee can not maintain ejectment before that time. *Ib.* 116.
10. *Bill to redeem by junior against senior mortgagee.*—A bill to redeem filed by a junior against a senior mortgagee, is a recognition of the validity of the older mortgage, and must offer to pay the amount due on it. *Fouche v. Swain*, 151.
11. *Mortgage filed in office of probate judge; when operative as record.* When a mortgage is filed for record in the office of the probate judge, it is "operative as a record from the day of the delivery to the judge" (Code, § 2149), and not from its subsequent registration. *Ib.* 151.
12. *Compromise of suit to foreclose mortgage; effect of.*—A suit to foreclose a mortgage being compromised by agreement of the parties, and an absolute deed executed to the mortgagee, although this can not affect the rights or equities of a junior mortgagee, it does not impair the lien or equitable rights of the senior mortgagee. *Ib.* 151.

MORTGAGES—*Continued.*

13. *Delivery of mortgage; what sufficient proof of.*—A mortgage being duly signed, acknowledged before a proper officer, and left, with the secured note, in the hands of the mortgagee and payee, this is a *prima facie* sufficient proof of delivery; and the rights of third persons, afterwards accruing, can not be affected by subsequent efforts to rescind the contract, or demands for the return of the papers. *Wildsmith v. Tracy et al.* 258.
14. *Mortgage of wife's statutory estate a nullity.*—A mortgage by a married woman of her statutory separate estate, to secure the debt of her husband, is a nullity. *Bergan v. Jeffries*, 349.
15. *Same; a bill to enjoin suit on, without equity.*—A bill to enjoin a suit on such mortgage is without equity, there being a good and perfect defense to the action at law. *Ib.* 349.
16. *Same; fraud does not give jurisdiction.*—The fact that a fraud may have been perpetrated on the wife, would not give jurisdiction, without some other ground of equitable cognizance, where there is a plain and adequate remedy at law. *Ib.* 349.
17. *Same; when mortgaged property is real estate.*—If the property mortgaged were real estate, instead of mere personalty, under the decisions of this court, the bill would not be without equity. *Ib.* 349.
18. *Jurisdiction.*—No jurisdiction can be derived from section 3757 of the present Code. *Ib.* 349.
19. *Credit on usurious debt by mortgagee.*—When the mortgagee receives mortgaged property from the mortgagor, to be credited at an agreed price on the mortgage debt, a subsequent abatement of the mortgage debt, on bill filed to redeem, on account of usury, will not entitle the mortgagee to a corresponding reduction of the credit allowed. *Knox v. Nall*, 347.
20. *Same; mortgage operating as general assignment.*—A mortgage conveying substantially all of a debtor's property, though given to secure a debt contemporaneously contracted, was declared and enforced as a general assignment, enuring to the benefit of the creditors equally (Code, § 2126), prior to the amendment of that statute, which excepts them from its operation (Sess. Acts, 1882-83, p. 189); and the amendatory law, not clearly appearing to have been intended to be retroactive in its operation, will not be construed to apply to mortgages executed prior to its enactment. *Warten v. Mathews*, 429.
21. *Mortgagee entitled to possession, unless contrary is stipulated.*—In the absence of a stipulation, express or implied, to the contrary, the mortgagee has the right of immediate possession; but, if his right of possession is postponed until default, or until the happening of some future contingency, he can not maintain trespass for an injury to the property committed during the intervening period. *Dunlap v. Steele & Vandergrift*, 424.
22. *Right of possession accrues to mortgagee upon happening of stipulated event.*—When the mortgage contains a stipulation authorizing the mortgagee to take possession, if default should be made in the payment of the secured debt at maturity, or if the property should be levied on, or taken possession of by a third person, the levy of an attachment on the property gives the mortgagee an immediate right of possession, and he may maintain trespass if the levy is forcible and unlawful. *Ib.* 424.
23. *Sale of the property under the levy; when does not relate back to commencement of suit.*—The sale of the property under the levy, after the institution of the suit, does not relate back to the commencement of the suit, so as to constitute a cause of action at that time; but if the levy was a trespass, the subsequent sale may be considered in estimating the damages. *Ib.* 424.

MORTGAGES—*Continued.*

24. *Attachment by landlord of the mortgagor; mortgagee can not maintain trespass on account of the levy.*—If the attachment was sued out by the landlord of the mortgagor, who had furnished the mortgaged property as advances to make a crop, his lien is superior to the mortgage, and the mortgagee can not maintain trespass on account of the levy. *Ib.* 424.
25. *Invasion of province of the jury.*—A charge which, on the facts hypothetically stated, withdraws from the jury the consideration of material inferences which they might have drawn, is an invasion of their province. *Ib.* 424.
26. *Sale under power in mortgage; purchase by mortgagee at his own sale.*—When lands are sold under a power contained in a mortgage, the sale cuts off the equity of redemption as effectually as a sale under a decree of foreclosure in equity, leaving in the mortgagor nothing but a statutory right of redemption; but, if the mortgagee becomes the purchaser at his own sale under the mortgage, he thereby arms the mortgagor with an option, if seasonably expressed, to disaffirm the sale, without regard to its fairness, or to the adequacy of the price; and when the sale is set aside, under bill filed within a reasonable time, the decree relates back to the day of the sale, and the parties are placed *in statu quo* as if no sale had been made. *Gassenheimer v. Molton*, 521.
27. *Sale of equity of redemption, under execution at law.*—An equity of redemption in lands may be sold under execution at law against the mortgagor (Code, § 3209), either before or after the law day and default, and whether the mortgagor or mortgagee is in possession. *Ib.* 521.
28. *Same; form of levy, and interest of purchaser.*—A judgment creditor of the mortgagor may levy his execution on the equity of redemption only, or on the land generally, not designating the interest of the mortgagor; the purchaser acquiring, in the former case, only the equity of redemption, and being estopped to deny the validity of the mortgage; and in the latter, the entire interest of the mortgagor, whether the mortgage is valid or invalid, paid or outstanding. *Ib.* 521.
29. *What constitutes payment of mortgage debt.*—Where a creditor, taking a mortgage from his debtor, assumes the payment of a prior mortgage on the property, but suffers it to be sold under that mortgage, becomes himself the purchaser at a sum sufficient to pay the debt, and pays the purchase-money; this is a substantial performance of his promise, the first mortgage being satisfied in full. *Hill, Fontaine & Co. v. Helton*, 528.
30. *Whether conveyance absolute on its face is a mortgage; what necessary to be shown.*—When the contestation is whether a conveyance, absolute on its face, was in fact intended as a mortgage, the party so asserting must show, by clear and convincing evidence, that such was the intention and understanding of both parties; but, where the contestation is whether the transaction was intended as a mortgage or as a conditional sale, with a reservation of the right to repurchase, the same stringency of proof is not required; and if the intention is in doubt, the court inclines to hold it a mortgage. *Mitchell v. Wellman*, 17.
31. *Absolute conveyance, with stipulation to repurchase.*—In this case, the conveyance being absolute in form, with a stipulation in a separate paper of the right to repurchase by a specified day; and the evidence showing that the transaction did not originate in a proposition for a loan, and that no debt existed or continued between the parties; the court declines to treat the transaction as a mortgage. *Ib.* 17.

MORTGAGES—*Continued.*

32. *Bar of mortgage debt does not affect specific lien of mortgage.*—The failure of the mortgagee to present his claim for the mortgage debt, within the time prescribed by the statute of non-claim, does not affect his specific lien in, or title to the property. *Smith et al. v. Gillam et al.*, 296.

NEGLIGENCE.

See RAILROADS, 1-2.

1. *Contributory negligence; when employee not guilty of, after notifying employer of defect in machinery.*—When a workman or servant gives notice to his employer of a defect in the machinery which he is required to use, and relying on his employer's promise to have the defect remedied, continues in the service, he is not guilty of contributory negligence, "at least until a reasonable time elapses within which to make the repairs." *Woodward Iron Co. v. Jones*, 123.
2. *In action for damages, employee need not aver that employer had reasonable time after notice to repair.*—In an action to recover damages on account of injuries afterwards sustained, it is not necessary to aver in the complaint that the employer had reasonable time to remedy the defect after the notice was given. *Ib.* 123.
3. *Contributory negligence; when employee guilty.*—When the plaintiff was working in the shaft of a coal mine, through which ran two railroad tracks, over which cars descended and brought up coal, the motive power being supplied by a stationary engine above ground; and had charge of a switch at a resting place along the line of a shaft, where descending cars could be turned off or placed back on the track, and an adjacent sump in which water accumulated, and from which it was pumped to the surface by the engine; and while standing on the track, repairing the water-pipe which had become clogged, was struck by a descending car, which he did not see or hear until too late, on account of the noise and steam in the shaft, the steam having escaped from a defective joint in the pipe, to which he had called the attention of the superintendent two days before; held, that the plaintiff knowing that the empty car was above, and having neglected to have the switch turned by his assistant, whom he had sent up to that point for another purpose, and being cognizant of the noise and steam which filled the shaft, was guilty of contributory negligence, and was not entitled to recover, although the general order was that a descending car should not be stopped at the switch unless a full car was ready to be carried back. *Ib.* 123.
4. *Liability of railroad company for injuries to stock or cattle.*—In an action against a railroad company to recover damages for injuries to cattle at or near a public road crossing (Code, §§ 1699, 1700), proof of injury raises the presumption of negligence, and casts on the defendant the burden of disproving it; and it is not disproved until all negligence is negatived, and a compliance with all statutory requirements is shown, or it is shown that a compliance was impossible, or would have been unavailing. (Explaining and limiting expressions in *M. & A. Railroad Co. v. Williams*, 53 Ala. 595; and *Clements v. E. T. V. & Ga. Railroad Co.*, 77 Ala. 533, as to which the court adds, "We do not hold ourselves committed to an extreme interpretation of either of those cases.") *Ala. G. S. R. Rd. Co. v. McAlpine*, 73.
5. *Direct and remote injuries.*—The negligence complained of being the failure of the defendant railway company to provide a light

NEGLIGENCE—*Continued.*

- at the ticket office, where plaintiff was injured by falling from the platform in the dark, although the fall was caused by a false step, it can not be assumed, as a matter of law, that the want of a light was not the efficient cause of the false step and consequent fall. *Ala. G. S. R. R. Co. v. Arnold*, 600.
6. *Accident, and contributory negligence.*—No action would lie, if the plaintiff's false step (and consequent fall) was entirely accidental, and without fault on the part of the defendant; nor if he was guilty of contributory negligence; but the evidence as to these matters being indeterminate, and resting in reference, the questions are properly submitted to the determination of the jury. *Ib.* 600.
 7. *Exemplary damages.*—Exemplary damages may be awarded, in an action against a railroad company for personal injuries, if the negligence was so gross as to evince an entire want of care, and sufficient to raise a presumption that the defendant, being cognizant of the probable consequences, was indifferent to the danger to which the persons or property of others was thereby exposed. *Ib.* 600.
 8. *Direct and remote injuries.*—Where plaintiff was struck and injured, while walking along a path by the side of a railroad track, by a cow which was thrown from the track by the engine, and which fell against plaintiff after striking the ground, the injury is the proximate consequence of the engine striking the cow; and the railroad company is liable on account of it, if there was negligence on the part of the engineer, although he was guilty of no negligence towards the plaintiff personally. *Ala. G. S. R. Rd. Co. v. Chapman*, 615.
 9. *Statutory duties of railroad engineer.*—Negligence is imputed by law to a railroad engineer, when he fails to comply with the statutory requirements in order to avoid injuries (Code, § 1699); but the statute does not require him to endeavor to stop his train, except "on perceiving an obstruction on the track;" and when he perceives a cow, not on, but near the track, on the embankment, and the animal attempts to cross the track when the engine is so near that he can not stop the train by the use of all the means in his power, the statute does not require him to make a vain and useless attempt. *Ib.* 615.
 10. *Same.*—A charge which instructs the jury that the engineer "is required to use all means known to skillful engineers, even greater diligence than the requirements laid down in the statute," is erroneous, since the statute prescribes the rule of diligence, and the courts can not add to it; and its requirements are, that he shall use all means "within his power" known to skillful engineers. *Ib.* 615.
 11. *Contributory negligence.*—Although the plaintiff, while walking along a path near the railroad track, on the company's right of way, was a trespasser, this did not constitute contributory negligence, if she made due use of her senses to discover an approaching train, and, on its nearer approach used proper exertions to place herself beyond peril. *Ib.* 615.

NOTICE.

1. *What is reasonable notice.*—In the absence of statutory regulations, if a lease contains no provision as to the notice necessary to put an end to the tenancy, reasonable and sufficient notice is "the interval between the times of payment of rent or the length of time by which the letting was first measured," and when the tenancy is by the month, a month's notice must be given. *McDevitt v. Lambert*, 536.

OVERRULED CASES; CASES DOUBTED, LIMITED, &c.

1. *Dudley v. Witter*, 51 Ala. 456, overruled by *Smih v. Alexander*, p. 251.
2. *Watson v. Rose's Ex'rs*, (51 Ala.) overruled by *Smith et al. v. Gil- lam et al.*, 296.
3. *Brooks v. Woods*, (40 Ala.) overruled by *Barclay v. Spraggins*, 357.
4. *Cochran v. Cunningham*, (16 Ala. 448), overruled by *Fancher Bros. v. Bibb Furnace Co.*, 481.
5. *Holloway v. Talbot*, (70 Ala. 392), *dictum* therein overruled by *Wilkinson v. Black*, 329.

PARTITION.

See CHANCERY II; PLEADING AND PRACTICE, 5.

1. *Partition; sale of lands for.*—It is well settled by the course of decisions in this State, that a court of equity is without jurisdiction to decree, for partition, the sale of land belonging to adult tenants, without their consent. *Johnson v. Kelly*, 135.
2. *Decree pro confesso; effect of.*—A decree *pro confesso* is an admission only of the allegations of the bill which are well pleaded; but, while such decree is an admission of the facts alleged, it is not an admission that the complainant is entitled to equitable relief, unless authorized by the allegations of the bill. *Ib.* 135.

PARTNERSHIP.

See FRAUDULENT CONVEYANCES, 3.

1. *Mode of stating partnership accounts by register.*—In the statement of a partnership account, which involves items of debit or credit against or in favor of one or both of the partners, it is erroneous to state the account in debtor or credit form as between the partners individually; but the account of each partner with the partnership should be first stated, and then the account between the partners individually on the basis of that result, one-half of the indebtedness of either to the firm being the amount of his indebtedness to the other; and individual debts paid by one for the other, should be charged in the individual account. *Garrett v. Robinson*, 192.
2. *Right of surviving member of insolvent partnership to make an assignment.*—The surviving member of an insolvent partnership may make an assignment for the equal benefit of all the creditors; but his power to mortgage the partnership effects, thereby giving the mortgagee a preference over other creditors, is a question which is worthy of consideration, and which is not decided. *Espy v. Comer et al.*, 333.
3. *When a partnership creditor becomes the creditor of the surviving partner.*—When a partnership creditor surrenders the partnership note, and accepts the individual note of the surviving partner, granting an extension of the day of payment, and taking a mortgage as security, he ceases to be a partnership creditor, and becomes the individual creditor of the surviving partner. *Ib.* 333.
4. *The creditors of a partnership can not claim under and against a mortgage.*—If the mortgage recites the substitution of the new note, and the surviving partner's individual ownership of the property conveyed, the other partnership creditors can not have it declared and foreclosed as a general assignment enuring to their equal benefit, by alleging that the partnership in fact owned an undivided interest in the property, which constituted all of its assets. They can not claim under and against the conveyance. *Ib.* 333.

PARTNERSHIP—*Continued.*

5. *Bill in equity; remedy of partnership creditors.*—If the partnership in fact owned an interest in the property conveyed by the mortgage, the remedy of the partnership creditors is a bill in equity founded on the dissolution and insolvency of the partnership, the insolvency and misapplication of the funds by the surviving partner, seeking to set aside the uses of the mortgage, and to have the assets marshalled and appropriated according to equitable principles. *Ib.* 333.
6. *Partner's interest in partnership property; execution against.*—A partner's individual share in any particular partnership property is not subject to levy and sale under execution against him; and if an execution against one partner is levied on partnership property, and a statutory claim is interposed by his co-partner, the plaintiff is not entitled to have a one-half interest in said property declared subject to his execution. *Tait v. Murphy*, 440.
7. *Partnership accounts; when liability between them matures.*—Where the vendor and purchaser of land, while the purchase-money is due and unpaid, enter into a partnership venture for getting out, rafting and selling timber, the purchaser agreeing to superintend the work, while the vendor paid for provisions and labor, and the net profits and losses were to be provided between them; until the timber is rafted and sold, and the net profits and losses ascertained, there is no debt or liability due from the purchaser to the vendor, to which the latter can apply a partial payment. *Heard v. Pulaski*, 503.
8. *Sale of partnership's entire stock by one partner.*—The principle is settled, that a sale of all the goods of a mercantile partnership at once is in the course of trade, and a fair sale of all by a single contract by one partner is within the implied powers incident to the partnership relation. *Ellis v. Allen, Bush & West*, 515.
9. *Same; remedies of other partner, or of creditors.*—Fair dealing between partners requires that, before one undertakes to sell the entire stock, either for cash or in payment of a debt, he should consult the other, if conveniently accessible, no sudden, imperative exigency arising; the other may protect himself by forbidding the sale, or dissenting before it is complete; and if it is consummated without notice to him, and works any wrong or injury to him, he may obtain relief in equity; but if he acquiesces in it, or declines to dissent and enforce his equitable rights, a partnership creditor can not assail it except on grounds which would avoid a sale by the partnership. *Ib.* 515.
10. *Same; conditional sale and subsequent assent or ratification by other partner.*—If the sale was made subject to the condition that the other partner should assent to it, his assent or subsequent ratification must be shown; but such assent or ratification may be either express or implied, and is a question for the jury, to be determined by a consideration of all the circumstances in evidence. *Ib.* 515.
11. *Submission to arbitration by partner.*—One partner has no right, without the concurrence of his co-partners, or against their objection, to submit a pending suit to arbitration; and such submission by him, and an award rendered under it, are no defense to the action. (Overruling *Cochran v. Cunningham*, 16 Ala. 748). *Fancher Bros. v. Bibb Fur. Co.*, 481.

PAYMENT; APPLICATION OF PAYMENTS.

1. *Application of payments; rule as to.*—When a debtor owes two or more separate debts to the same creditor, and makes a general payment, not specifying the particular debt to which it shall be

PAYMENT; APPLICATION OF PAYMENTS—*Continued.*

- applied, the creditor may apply it at his own election; but, if the payment is made with the proceeds or sale of mortgaged property, it must be applied to the extinguishment, *pro tanto*, of the mortgage debt, unless the debtor consents to a different application. *Taylor & Co. v. Cockrell*, 236.
2. *Same; recital in mortgage as indicating acquiescence in application of payments previously made.*—In an action on two notes, each secured by a separate mortgage, a question being as to the application of partial payments arising from the proceeds of sale of the mortgaged property—whether on the notes thereby secured, or on an unsecured debt—a recital in the second mortgage as to the balance remaining unpaid on the note secured by the first, is competent evidence for the plaintiff, as showing an admission by the defendant that the previous payments had been properly applied.—*Ib.* 236.
 3. *Application of payments.*—When several debts are due by a debtor to one creditor, and he makes a partial payment, he may direct to which debt it shall be applied, unless there is some particular relation, legal or contractual, which denies him this right of election; and if, having this right of election, he makes a partial payment without directing its particular application, the creditor may at once make the application, but not to a debt or liability not yet due. *Heard v. Pulaski*, 502.

PLEADING AND PRACTICE.

1. *Non-joinder of wife; when not pleadable in abatement.*—In a statutory action in the nature of ejectment, the defendant can not plead in abatement the non-joinder of his wife, since the proof of the title in her, although she was not a party, would defeat the action. *Stapp v. Wilkinson*, 47.
2. *Who may dispute consideration of conveyance.*—A party who does not claim under a conveyance is not precluded from disputing its consideration as recited. *Ib.* 47.
3. *Destruction of deed.*—The destruction of a deed does not work a divestiture of the grantee's title. *Ib.* 47.
4. *When joint action will lie; when not.*—If the cotton was converted by the wrongful act of the tenant himself, co-operating with the other defendants, who had notice of the landlord's rights, a joint action for the wrongful act may be maintained against all of them; but, if the wrongful act of each was separate and distinct, a joint action can not be maintained against them. *Powell et al. v. Thompson*, 51.
5. *When sureties on replevy bond are jointly liable with their principal.* While the removal of the tenant's crop from the rented premises, without the consent of the landlord, and without paying the rent, is *prima facie* a wrongful act, tending to the destruction of the landlord's lien; yet it may be justified by proof of legal right or lawful excuse, as by showing that it was replevied by the tenant after attachment levied at the suit of the landlord, and after the expiration of the tenancy and the tenant's removal from the rented premises; but, if such replevy, was made, not in good faith for the preservation of the cotton, but with the intention to waste and convert it, and the sureties on the bond had notice of such wrongful intent, they are liable for the conversion jointly with their principal. *Ib.* 51.
6. *Joining issue, without objection, on defective pleas; effect of.*—Issue being joined, without objection, on defective or insufficient pleas, advantage can not be taken of their defects on error. *Jones v. Collins*, 108.

PLEADING AND PRACTICE—*Continued.*

7. *Error without injury.*—Under a plea in abatement, averring residence and freehold in another county at the commencement of the suit, two issues being presented—namely, in what county the defendant resided, and whether he had estopped himself from setting up such residence by reason of admissions made to the plaintiff and his attorney; in such case, when the verdict of the jury affirmatively ascertains the fact of the defendant's residence in the county in which the suit was brought, then, though there may have been error in the charge of the court on the issue of estoppel, it is error without injury, and constitutes no cause for reversal. *Raney v. Raney*, 157.
8. *Repleader; when award of, equivalent to granting new trial.*—Where issue is joined on several insufficient special pleas and on the general issue, and there is a general verdict for the defendant on all the issues; while the bill of exceptions, purporting to set out all the evidence, shows that the plaintiff made out a *prima facie* case, and that the defendant's evidence only supported the insufficient pleas; the award of a repleader, if not technically correct, is the same in substance as granting a new trial, with leave to amend the pleadings, and accomplishes substantial justice. *Ex parte, Pearce*, 195.
9. *Written contract under which rights of parties to be determined; refusal to require production of when the record shows plaintiff had it in court a reversible error.*—As held in this case on the former appeal (67 Ala. 504), the plaintiff should be required to produce the written contract with Robbs Brothers under which the timber was felled, and by which the relative rights of the parties are to be determined; and the refusal to require the production of this paper, when the record shows that the plaintiff had it in court, is a reversible error. *Street v. Nelson*, 230.
10. *Substitution of party plaintiff.*—When the plaintiff sues in an unofficial character, and his term of office expires by limitation of law before the termination of the suit, his successor may be substituted as plaintiff on motion; but, when a plaintiff makes a voluntary assignment *pendente lite*, his assignee does not become a necessary party.—*Smith v. Inge*, 283.
11. *Constitutionality of laws abolishing city of Mobile and creating port of Mobile; by whom questioned.*—The constitutionality of the legislation abolishing the city of Mobile as a municipal corporation, and creating the port of Mobile its successor (Sess. Acts 1878-79, pp. 381-92; *Ib.* 1880-81, pp. 329-32), can not be assailed by a person who does not show that his rights or remedies as a creditor of the old corporation are thereby destroyed or impaired, or that he is otherwise in a position to be injured. *Ib.* 283.
12. *When plea may be struck from file.*—When a plea is substantially defective, it may be struck from the files on motion, without putting the plaintiff to his demurrer. *Dicks v. Belsher*, 369.
13. *Misjoinder; when objection to, waived.*—When the probate of a will is contested by one of the testator's children, who is a married woman, if it is improper to join her husband with her as a contestant, the misjoinder is waived by joining issue and going to trial on the merits, and is not available on motion in arrest of judgment. *Blake v. Harlan*, 37.
14. *Non-joinder of wife; when not pleadable in abatement.*—In a statutory action in the nature of ejectment, the defendant can not plead in abatement the non-joinder of his wife, since the proof of the title is in her, although she was not a party, would defeat the action. *Stapp v. Wilkinson*, 47.
15. *Who may dispute consideration of conveyance.*—A party who does

PLEADING AND PRACTICE—*Continued.*

- not claim under a conveyance is not precluded from disputing its consideration as recited. *Ib.* 47.
16. *Several complainants ; effect of failure of one to recover.*—If one of several complainants shows no right to recover, the others can not recover; and if the one so failing was the original complainant, the others having been brought in by amended bill, the defect can not be cured by amendment. *Reynolds v. Caldwell*, 232.
 17. *Interlocutory decree from which appeal lies ; what is not.*—The overruling of a demurrer to a petition to set aside a sale of land under execution, no other order being made in the case, is not one of the interlocutory decrees from which an appeal is given by statute (Code, §§ 3916–18–21–2) ; and an appeal from such decree will be dismissed, *ex mero motu*, by the court. *Clark v. Spencer*, 345.
 18. *Improperly sustaining demurrer to plea.*—The general rule is that injury results to the party against whom the error was made, when a demurrer is improperly sustained to a plea, and will operate a reversal; but, when it affirmatively appears that the party complaining has had, under the general issue of special pleas, all the benefits he could have had under the plea to which the demurrer was sustained, the error is not a cause of reversal. *Owings v. Binford*, 421.
 19. *Service of summons on defendants.*—No valid judgment can be rendered against a party not before a court, and, on appeal, the record must reasonably show that the defendant was served or appeared. Where the record does not disclose the fact, inquiry must be addressed to the proper construction of the judgment entry. *Ib.* 421.
 20. *Construction of judgment recitals.*—The recitals of the judgment may be sufficient to bring in parties without service, and this construction will be placed upon them if necessary to preserve the verity of the record; but, if the recitals are consistent with the hypothesis that they did not appear, and the maintenance of the verity of the records does not require such construction, no intendment will be indulged in favor of the appearance. *Ib.* 421.
 21. *Case at bar.*—In the case at bar the name of each defendant is set out in the margin; the recitals are “*came the parties by attorneys;*” a judgment is rendered against all the defendants, *each being specially named in the judgment*. The necessary construction is that all appeared. *Ib.* 421.

PARTIES.

22. *Parties to bill.*—When a bill seeks to enforce a vendor’s lien for the unpaid purchase-money of land, which was sold for distribution among the heirs of the deceased owner, under a decree of the Probate Court, all the persons in whom the legal title was vested are necessary parties. *Gurner v. Kelso*, 497.
23. *Same ; who are heirs and next of kin of deceased grandchild.*—The only son of a deceased daughter, who left neither child, father, mother, nor maternal grandmother, living at the time of his death, being one of the heirs at law of the decedent; it can not be assumed that his four maternal aunts are his only heirs and next of kin, when that fact is not averred, and it is not shown that he left no grandfather, nor maternal grandmother, nor maternal uncle or aunts. *Ib.* 497.
24. *Same ; personal representative of deceased heir.*—It being shown that a part of the purchase-money for the land was paid, and was distributed in unequal proportions among the several heirs; the personal representative of a deceased heir, who had received

PLEADING AND PRACTICE—*Continued.*

more than his proportion of the money, is a necessary party to the statement of the account; and being made a party, on his own motion, after the account has been taken, the register's report made, and on the day before the final decree was rendered, the decree will be reversed at his instance. *Ib.* 497.

25. *Decree distributing purchase-money; settlement of decedent's estate.* Under such bill to enforce the vendor's lien, a decree distributing the unpaid purchase-money can not be rendered without a statement of the accounts of the deceased administrator, who was the purchaser, and who had made unequal distribution among the heirs; and this cannot be done without a removal of the settlement of the estate from the Probate Court, under pleadings properly framed; nor can such removal be asked by the personal representative unless special equitable reasons are shown. *Ib.* 497.

PHYSICIANS.

1. *Act adopting the Code; effect of subsequent act incorporated therein.* By the act adopting the Code of 1876, which was approved February 2d, 1877, it was provided, that "no act of the General Assembly passed at the present session shall be repealed or otherwise affected by" its adoption; and by force of this provision, an act passed subsequent to the adoption of the Code, and therein incorporated by the codifiers, repeals by implication any other provisions relating to the same subject with which it is in irreconcilable conflict. *Harrison v. Jones*, 412.
2. *Who authorized to determine qualifications of persons desiring to practice medicine.*—Under the provisions of the act to regulate the practice of medicine in this State, approved February 9th, 1877, (Code, §§ 1528–35), the board of censors of the State Medical Association, and the board of censors of the several affiliated county associations, alone have authority to determine the qualifications required of persons desiring to practice medicine, and to grant certificates of qualification; and any person who engages in the practice of medicine, without having procured a certificate of qualification (§ 4244), is declared guilty of a misdemeanor. *Ib.* 412.
3. *No recovery had for medical services unless there is a legal certificate of qualification.*—A penalty imposed by statute implies a prohibition; consequently, a recovery can not be had for medical services rendered by a person who has not procured a certificate of qualification from the proper medical authorities of the county in which he practices. *Ib.* 412.

PRINCIPAL AND SURETY.

1. *Discharge of principal by operation of law not discharge of surety.* The discharge of a principal by operation of law, as in case of bankruptcy, insolvency, or of non-claim, does not operate to discharge a surety who is liable for a debt. *Smith et al. v. Gillam et al.*, 296.
2. *Assignment of judgment, on payment, to surety; creditor's right to pursue equitable assets.*—When a judgment against principal and surety is paid by the latter, and then assigned to him by the plaintiff, the surety "may assert, in law or equity, any lien or right against the principal debtor which the plaintiff could assert if the debt had not been paid" (Code, § 3418); and he may therefore maintain a bill in equity to reach and subject property fraudulently conveyed by his deceased debtor while living, on averment and proof of a deficiency of legal assets. *Fearn, Ex'r, v. Ward, Adm'r*, 555.

PRINCIPAL AND AGENT.

1. *Proof of agency.*—The fact of agency may be proved by circumstances, and may be inferred from previous employment in similar acts or transactions, or from acts of such nature and so continuous as to furnish a reasonable basis of inference that they were known to the principal, and that he would not have allowed the agent to so act without authority; but the fact that the agent performed similar acts for other persons in the neighborhood, in and about the same business, does not authorize the inference that he was authorized to perform such acts as agent for plaintiff. *Hill, Fontaine & Co. v. Helton, 528.*
2. *Declarations of agent; admissibility of, as evidence against principal.* The declarations of an agent, made during the continuance of the agency, and while in the discharge of his duties as agent, respecting a transaction then depending, and so contemporaneous with the main fact as to constitute a part of the *res gestæ*, are binding on the principal, and admissible as evidence against him; but this rule does not apply to declarations which are merely narrative of a past transaction, or which do not appear to relate to the subject of the particular agency. *Ib. 528.*
3. *Extent of agent's authority.*—Authority to an agent to ship cotton, and forward bills of lading to the consignees, does not include or imply authority to receive advances on the cotton from the consignees; and while authority to ship and sell may imply authority to receive the proceeds of sale, it does not confer authority to appropriate the proceeds of sale to the payment of the agent's individual debt.—*Ib. 528.*

RAILROADS.

1. *Charge to jury as to evidence on question of negligence.*—In an action against a railroad company to recover damages for killing stock, where the court has properly charged the jury that, if they believe the evidence, they must find for the plaintiff, it is not error to further instruct them "that if, under the facts and circumstance shown in evidence, they did not believe the evidence offered by the defendant, tending to acquit itself of negligence, then a verdict may be found for the plaintiff." This is but the legal and logical result in every case, where the party upon whom rests the burden of proof attempts to sustain it by evidence that is not believed. *A. G. S. R. R. Co. v. McAlpine & Co., 73.*
2. *Liability of railroad company for injuries to stock or cattle.*—In an action against a railroad company to recover damages for injuries to cattle at or near a public road crossing (Code, §§ 1699, 1700), proof of injury raises the presumption of negligence, and casts on the defendant the burden of disproving it; and it is disproved until all negligence is negated, and a compliance was shown to be impossible, or would have been unavailing. (Explaining and limiting expressions in *M. & A. Railroad Co. v. Williams, 53 Ala. 595*; and *Clements v. E. T., V. & Ga. Railroad Co., 77 Ala. 533*, as to which the court adds, "We do not hold ourselves committed to an extreme interpretation of either of those cases. *Ib. 73.*")
3. *Bill of lading in name of shipper.*—When the vendor and shipper of goods takes the bill of lading in his own name, he thereby retains the title in himself, and the carrier can not rightfully deliver the goods to any other person, except on his order, or transfer of the bill of lading. *Young v. The East Ala. Railway Co. 100.*
4. *When carrier may maintain detinue.*—If the carrier, through mistake, or by the fraudulent representations of a third person, wrongfully delivers the goods to a person who has no right to them, he may maintain an action of detinue or trover for them,

RAILROADS—*Continued.*

against the person so receiving them, or any other person to whom he may deliver them. *Ib.* 100.

5. *Relation of bailor and bailee.*—If the goods are delivered by the person so wrongfully receiving them to another carrier, on whom he afterwards gives plaintiff an order for them, and this carrier, accepting the order, and receiving the charges for freight, agrees to deliver them to plaintiff on demand; this creates between them the relation of bailor and bailee. *Ib.* 100.
6. *Bailee, can not set up title in third person, but may deliver to rightful owner.*—As a general rule, the bailee can not set up the title of a third person, in defense of an action by his bailor; but, if the bailor in fact had no valid title, the bailee may deliver the goods to the rightful owner on demand, or hold them subject to his order on notice and demand, the *onus* of proving that defense resting on him. *Ib.* 100.

REFORMATION.

See CHANCERY.

RECEIVERS.

1. *The power to appoint receivers in vacation.*—Can only be exercised in a pending suit. The filing of the bill is the commencement of the suit. *Harwell v. Potts*, 70.
2. *Appointment of receiver; when void.*—The appointment of a receiver in vacation, before the filing of the bill, is without jurisdiction, and void. *Ib.* 70.
3. *Same.*—The subsequent filing of the bill, and giving the requisite bond by the receiver, can not impart validity to the void act of his appointment before bill filed. *Ib.* 70.
4. *Receiver holds for benefit of parties.*—A receiver, in a chancery suit, holds for the benefit of the parties pending the suit, and, on its termination, for the benefit of the party who is ascertained to be entitled to the fund or property; and while the rights of a stranger, intervening *pro interesse suo*, will be protected, they can not be enlarged by reason of the receivership. *Gayle v. Johnson et al.*, 388.
5. *When receiver's possession is that of heirs.*—A receiver of the rents and profits of real estate being appointed, pending a suit between the heirs at law and the surviving husband of the decedent, to which the administrator was not a party; on the termination of the suit in favor of the heirs, the possession of the receiver is their possession, and the rents and profits received by him can not be claimed by an administrator subsequently appointed. *Ib.* 388.

RIGHT OF WAY.

1. *Right of way.*—The conveyance of a right of way over a parcel of land, not defining its limits, but simply designating the place, where it may be reasonably enjoyed, does not operate to pass a right to the unobstructed use of the entire lot described. *Long v. Gill*, 408.
2. *Burden of proof.*—When an affirmative fact is averred, on which the title to relief is founded, and is denied, the burden of proof rests on the complainant, and it is incumbent on him to produce a sufficiency of evidence to satisfy the mind. *Ib.* 408.

SALVAGE PROCEEDINGS.

1. *Statutory proceedings and remedies.*—Statutory provisions which take away, change or diminish the fundamental rights of life,

SALVAGE PROCEEDINGS—*Continued.*

liberty or property, are to be strictly construed; and statutory remedies, for the enforcement of rights unknown to the common law, "are to be followed with strictness, both as to the methods to be pursued, and the cases to which they are applied." *Crowder v. Fletcher & Co.*, 219.

2. *Salvage proceedings in matter of property adrift.*—The statutory proceedings authorizing property adrift to be taken up and secured, and giving a right of salvage to the person who performs such services (Code, §§ 2863–67), create a right, and provide a summary remedy for its enforcement; and being in derogation of the common law, everything necessary to confer jurisdiction must affirmatively appear, and nothing will be intended to have been done which is not affirmatively shown to have been done. *Ib.* 219.
3. *Same; appointment of appraisers.*—The property must be first exhibited to the justice, and he must determine whether, in his opinion, it is worth more than thirty dollars; and unless it affirmatively appears by a note or minute by him, which is a *quasi* record, that he determined its value to be more than thirty dollars, an order appointing appraisers is void, and their appraisal does not fasten a statutory charge on the property. *Ib.* 219.

SET-OFF.

See PLEADING AND PRACTICE.

SHERIFF.

See ATTACHMENT, 4.

1. *Title of purchaser at sheriff's sale under judgment in attachment relates back to levy of attachment.*—A purchaser at sheriff's sale, under a judgment in an attachment case, acquires a title which dates back to the levy of the attachment, and overrides an intermediate conveyance by the defendant. *Striplin & Co. v. Cooper & Son*, 256.

STATUTORY CONSTRUCTION.

1. *Construction of statute as to cases within letter, but not within spirit.* There are cases which require the courts to disregard the letter of a statute, when manifestly opposed to its spirit; but, to justify this, there must be a moral conviction, based on the unreasonableness of the application sought to be made, that the legislature could not have intended such result, and it is not enough that the statute appears to be not promotive of the best interests of society or individuals. *Napier v. Foster*, 379.
2. *Retroactive statutes.*—A retroactive operation will not be given to a statute, unless the legislative intent that it shall so operate is clearly expressed, or so clearly implied as to amount to an express declaration. *Warten v. Mathews*, 429.
3. A penalty imposed by statute implies a prohibition.—*Harrison v. Jones*, 412.
2. *Proviso to statute or section.*—The appropriate office of a proviso, generally, is to modify or restrain the enacting clause, or preceding matter only, unless a different intention is apparent; but, when the context and all the provisions relating to the same subject matter show an intent to give to the proviso a scope and effect beyond the section to which it is annexed, or the phrase immediately preceding it, it may be construed as restraining or qualifying preceding sections, or even as tantamount to an enactment in a separate section. *Wartensleben v. Haithcock*, 565.

STALENESS OF DEMAND.

See CHANCERY—GENERAL PRINCIPLE, 18 (p. 78).

STOCK DISTRICT.

1. *Jurisdictional facts; duty of the court.*—In a petition to establish a district under act of the legislature, in which stock are not allowed to run at large, the averment of the desire for an order to be made establishing such district, describing it; that petitioners are residents of the district; and such petition is signed by the freeholders, and filed with the judge of probate at least thirty days before the next term of the court; and notices of the application given, as required by the act, the court must hear the petition and make an order granting or dismissing it, in whole or in part. *Stanfill v. Court Co. Rev. Dallas Co.*, 287.
2. *Certiorari proper remedy when no mode of review provided; judgment to be rendered.*—No mode of review having been specifically provided, *certiorari* is the proper remedy to review the questions of jurisdiction and the regularity of proceedings in the Court of County Revenue; and a judgment quashing or affirming the proceedings, is the only judgment which can be rendered on review. *Ib.* 387.
3. *Counties*, though bodies corporate under the statute, are, more strictly speaking, political or civil divisions—governmental or auxiliary agencies—and the powers conferred on them are delegated for the purposes of civil and political organization, and can not be said to be violative of the maxim that legislative powers can not be delegated. *Ib.* 287.

TAXATION.

1. *Constitutional provisions regulating taxation on property.*—The constitutional provisions which declare that "all taxes levied on property shall be assessed in exact proportion to the value of such property," and inhibit the levy of "a greater rate of taxation than three-fourths of one *per centum* on the value of taxable property within this State," (Art. xi, §§ 1, 4), prescribe a rule and limit of taxation on property, but do not include all the legitimate subjects of taxation, some of which are not susceptible of determinate value., *West. Un. Tel. Co. v. State Board of Ass'ment*, 273.
2. *Tax on gross receipts from business of telegraph companies; constitutionality and extent of.*—The tax of two *per cent.* levied on the gross amount of the receipts of every telegraph company, "derived from business done by it in this State" (Sess. Acts 1884-5, p. 10, § 6, subd. 6), is not violative of any constitutional provision regulating taxation; nor is it an unauthorized interference with inter-state commerce, although it includes receipts here on messages sent to or from places beyond the limits of the State. *Ib.* 273.
3. *Sale of lands for unpaid taxes; affidavit of collector as to want of personal property.*—Under the provisions of the act approved February 12th, 1879, relating to the sale of lands for delinquent taxes (Sess. Acts, 1878-9, pp. 3-8), the affidavit which the tax-collector is required (§ 12) to make and enter in the book filed by him in the office of the probate judge, as to his inability to find personal property after diligent search, is a jurisdictional fact, without which the court has no authority to make an order of sale. *Wartensleben v. Haithcock*, 565.
4. *Amendment of complaint; claim of lien for taxes paid.*—When the purchaser of lands at a sale for unpaid taxes brings an action

TAXATION—Continued.

to recover the possession, and the sale is held invalid on any ground except that the taxes were not in fact due and unpaid, he may have judgment for the amount paid by him, with subsequent taxes, and statutory penalty, which constitutes a lien on the land (Sess. Acts, 1878-9, p. 8); and when it becomes apparent, from the rulings of the court during the trial, that this suit must fail, he has a right to amend his complaint by making the statutory statement and claim. *Wartensleben v. Haithcock* 565.

TELEGRAPH COMPANIES.

1. *Constitutional provisions regulating taxation on property.*—The constitutional provision which declares that "all taxes levied on property shall be assessed in exact proportion to the value of such property," and inhibit the levy of "a greater rate of taxation than three-fourths of one *per centum* on the value of taxable property within this State," (Art. XI, §§ 1, 4), prescribe a rule and limit of taxation on property, but do not include all the legitimate subjects of taxation, some of which are not susceptible of determinate value. *Western Union Tel. Co. v. State Board of Assessment*, 273.
2. *Tax on gross receipts from business of telegraph companies; constitutionality and extent of.*—The tax of two *per cent.* levied on the gross amount of the receipts of every telegraph company, "derived from business done by it in this State" (Sess. Acts 1884-5, p. 10, § 6, subd. 6), is not violative of any constitutional provision regulating taxation; nor is it an unauthorized interference with inter-state commerce, although it includes receipts here on messages sent to or from places beyond the limits of the State. *Ib.* 273.

TENANTS IN COMMON.

1. *Sale of lands belonging to tenants in common, one of whom is a lunatic and the other his guardian.*—Where one of two tenants in common has been declared a lunatic, and the other appointed his guardian; if the latter obtains from the Probate Court an order for the sale of the lunatic's interest in the land, it is questionable whether he can rightly make a joint sale of the entire land, or whether such sale, if made, could or would be approved by the court. *East v. East*, 199.
2. *Same.*—If he sells his own interest in the land at the same time, to the same purchaser, and at the same price, taking separate notes for the purchase-money, one payable to himself individually, and the other as guardian, he can not unite the two demands in one bill to enforce a vendor's lien on the land. *Ib.* 199.
3. *Requisites of application.*—In an application for the sale of property for division or distribution among several tenants in common (Code §§ 3498, 3515), the petition must set forth the names and residences of all the parties interested in the property, and this statutory requirement, which is jurisdictional, includes the petitioner. *Ballard v. Johns*, 32.
4. *Same; death of co-tenant.*—If the petition shows that one of the tenants in common has died, it must show to whom his interest has descended, or in whom it has become vested, and such persons must be made parties. *Ib.* 32.
5. *Administrator ad litem for deceased co-tenant.*—If it appears that the deceased tenant owed debts at the time of his death, the court should appoint an administrator *ad litem* to protect the interest of creditors. *Ib.* 32.

TENANTS IN COMMON—*Continued.*

6. *False claim does not oust jurisdiction.*—Although a partition or sale can not be decreed by the Probate Court, where an adverse claim or title is asserted (Code, § 3412), yet the jurisdiction of the court will not be ousted by a false assertion of an adverse claim by one of the defendants. *Ib.* 32.
7. *Surviving husband necessary party.*—The surviving husband of a deceased tenant in common is a proper and necessary party to proceedings for partition. *Ib.* 32.
8. *Tenants in common; use and occupation.*—At common law, a tenant in common was not liable to his co-tenant for use and occupation, unless there was an actual eviction, or an agreement to pay rent; and the English statute (4th and 5th Anne) changing the rule, having been enacted after the settlement of this county, is not of force with us. *Ib.* 32.
9. *Same; account for rents received.*—For rents actually received one tenant in common is liable to account to his co-tenant; but, when the rents were received from a tenant to whom necessary advances to make a crop were supplied, such advances, and other necessary costs and expenses incurred, must be deducted from the gross amount received. *Gayle et al. v. Johnston*, 395.

TRESPASS.

TRESPASS QUARE CLAUSUM FREGIT.

1. *Non-suit; when statute authorizing not applicable to trespass quare clausum fregit.*—The statute authorizing a non-suit against the plaintiff, when his recovery is less than the minimum sum of which the court has jurisdiction (Code, § 3120), does not apply to an action of trespass quare clausum fregit. *Morris v. Robinson*, 291.
2. *Costs taxed in favor of successful joint defendant.*—In a judgment in favor of one joint defendant and against another, a recital that the successful defendant "go hence and recover of the plaintiff his costs in this behalf expended," means that he recover that part of the costs which he himself had incurred. *Ib.* 291.
3. *Title not necessarily in issue, in trespass quare clausum fregit.*—Possession is the great underlying fact which supports the action, though in many cases title is material, as in mitigation of damages. *Ib.* 291.
4. *Oral evidence of intention in deed.*—It is error to admit oral testimony of the intention with which a deed is executed. *Ib.* 291.
5. *Possession, or title with right to immediate possession, necessary to maintain trespass.*—To maintain an act of trespass for injuries to personal property, the plaintiff must have, at the time of the injury, actual possession, or title and right to immediate possession. *Dunlap v. Steele & Vandegrift*, 424.

TRIAL OF RIGHT OF PROPERTY.

See *Higginbotham & Co. v. Clayton & Webb*, 194.

1. *Assessing separate value of articles levied on.*—On the trial of a statutory claim suit for four yokes of oxen and two carts, verdict and judgment being rendered for the plaintiff in execution (Code, § 3343), the value of each article must be assessed separately, and it is error to assess a gross sum as the aggregate value. *Tait v. Murphy* 440.

TROVER.

1. *Felling and conversion of timber by trespasser upon land ; when owner may maintain trover or detinue.*—When a trespasser enters upon land, fells timber, and converts it to his own use, the owner may maintain trover for the conversion, or detinue for the property, if it can be identified, notwithstanding any change in its form ; but this principle does not apply to timber cut by an adverse possessor. *Street v. Nelson*, 230.
2. *Trover ; legal title or present right to possession necessary to maintain.* To maintain trover, the plaintiff must have a right to the property itself, not a mere lien on it ; a legal title, or present right to possession. *Ib.* 230.
3. *Agent ; authority of.*—Authority to an agent “to trade off said mule, if he could get anything that suited him,” does not empower him to exchange the mule for another, and bind his principal to pay a sum of money, as the estimated difference in value. *McMillan v. Wooten*, 263.
4. *Revision of judgment of Selma City Court, under special statute.*—In reviewing a judgment of the City Court of Selma, rendered by the court without the intervention of the jury, (Sess. Acts, 1875–6, p. 390, § 14), this court is not allowed to indulge any presumption whatever in favor of its findings on the evidence. *Butler v. Jones*, 436.
5. *What constitutes conversion ; demand and refusal.*—A demand and refusal are, generally, evidence of a conversion ; but a qualified, conditional, and reasonable refusal, is not evidence of a conversion ; as where the defendant, being the owner of premises which had been leased, and in possession of furniture left on the premises by a deceased tenant, refuses to deliver it on demand by the owner, who had lent it to the tenant, unless identified by him or some other person. *Ib.* 436.
6. *Unrecorded loan of personal property.*—Possession of personal property for three years, under an unrecorded loan, vests in the loanee an absolute title as against *bona fide* creditors and purchasers (Code, § 2173) ; but, as against all other persons, the statute neither confers any rights on him, nor takes away any rights from the lender. *Ib.* 436.
7. *Testimony of party, as to transactions with decedent.*—The estate of a deceased tenant, who died in the possession of personal property which had been lent to him, is not interested in the result of a suit brought by the lender against the landlord, to recover damages for the conversion of such property (Code, § 3058) ; and therefore, in such action, the plaintiff may testify as to any relevant fact showing the bailment. *Ib.* 436.
8. *Plea of former judgment in bar ; replication and evidence.*—In trover for the conversion of cotton seed, a former judgment being pleaded in bar, in which a set-off was claimed on account of the value of the cotton seed, it is competent for the plaintiff to show that, on the former trial, under the evidence and the rulings of the court thereon, the claim of set-off was disallowed, because the plaintiff in the action had an unsatisfied lien on the cotton seed ; and a replication averring these facts is a good answer to the plea. *Haas v. Taylor*, 459.
9. *Lien of bailee, and liability for negligence.*—The proprietor of a gin-nery has a lien on cotton delivered to him to be ginned, for his services in ginning it, and is entitled to retain the possession until his charges are paid, but, if his lien has been discharged, and the property is not forthcoming on demand, the *onus* is on him to prove that it perished, was destroyed, lost or stolen, although he had exercised ordinary diligence in preserving it ; and his

TROVER—*Continued.*

liability extends equally to the act of his agent in charge, or of a subsequent lessee of the ginnery. *Ib.* 459.

10. *Demand and conversion.*—When the conversion complained of consists in a failure or refusal to deliver on demand, the demand must have been made after the plaintiff's right to the possession accrued; but, when the conversion consists of an unauthorized disposition, waste, or destruction of the property, no demand is necessary. *Ib.* 459.

TRUSTS AND TRUSTEES.

1. *Personal trust under will; when executor invested with.*—Where the testatrix appointed her husband as the executor of her will, giving him a life-estate in all the property, with remainder to their children, giving also to him a discretionary power to sell and re-invest, and relieving him from giving bond; *held*, that a personal trust was created, which did not attach to the executorial office, but was limited to the donee of the power. *Proctor v. Scharpf*, 237.
2. *Resulting trust; when arising; may be established by parol evidence.* A resulting trust arises, by operation of law, in favor of the person who advances the purchase-money of land, though the title be taken in the name of another; or in favor of the person for whom it is advanced by way of loan, the title being taken in the name of the lender as security for its repayment; and this trust, not being within the statute of frauds (Code, § 2199), may be established by parol evidence. *Bates v. Kelly*, 142.
3. *Same.*—The court analyses the evidence in this case, and holds, as the chancellor held, that the writings fully establish a resulting trust, notwithstanding irreconcilable conflicts in the testimony of the parties. *Ib.* 142.
4. *Purchase with notice of facts out of which resulting trust arises.*—A purchaser of the land from the party in whose name the title is taken, having notice of the facts out of which the resulting trust arises, can not claim protection against it. *Ib.* 142.
5. *Offer to do equity; what sufficient.*—An offer in the bill to do equity, by paying the money advanced with interest, is sufficient, when it is shown that a prior offer or tender would have been useless, the defendants repudiating the trust sought to be enforced against them. *Ib.* 142.
6. *Acceptance of trust is ordinarily presumed; when may be inferred.* Acceptance of a trust, created by will, deed, or other instrument, is ordinarily presumed, and is not required to be in writing, nor manifested by express words, but may be inferred from interference with the trust property, or acts done in performance of the duties of the trust. *Kennedy's Ex'r, v. Winn*, 165.
7. *Voluntary interference with trust property; when regarded as acceptance of trust.*—Any voluntary interference with the trust property will be held an acceptance, unless it can be plainly referred to some other ground of action; the *onus* being on the trustee to show this, and every doubt being resolved against him. *Ib.* 165.
8. *Giving of receipt by trustee describing himself as such; when indicating acceptance of trust—(this case).*—Where a sum of money was bequeathed in trust, to be loaned out on bills of exchange or bonds secured by mortgage, the interest to be collected semi-annually by the trustee, and paid over to the beneficiaries; and the administrator of the estate made an arrangement with a mercantile house, of which the trustee was a partner, to supply the beneficiaries with goods on credit, to be paid out of the semi-annual interest as it accrued, and paid the accounts every six

TRUSTS AND TRUSTEES—*Continued.*

- months, taking receipts signed by the trustee as such; *held*, that the giving of these receipts showed an acceptance of the trust, notwithstanding the accompanying declarations of the trustee that "he would not accept the general trust," and the fact that the administrator represented that he only wanted a proper receipt to use as a voucher on his settlement. *Ib.* 165.
9. *Refusal of trustee to allow process for collection of decree rendered in his favor to be issued; liability of trustee for loss caused by such action (this case).*—On final settlement of the administrator's accounts, a decree was rendered against him, in favor of the trustee, for the amount of the trust, whereupon the trustee disavowed the authority to use his name, filed a protest in the Probate Court, and would not allow any process for the collection of the decree to be issued in his name; *held*, on these facts, the money being lost by the failure to collect the decree, that the trustee was liable for the loss. *Ib.* 165.
 10. *Statute of limitations has no application, in cases of express trusts, between trustee and beneficiaries.*—In cases of express trusts, the statute of limitations has no application as between the trustee and beneficiaries, and no length of time, short of the period of prescription, is a bar; though there are exceptions to this rule, where there has been a settlement, or other final termination of the trust, or an open disavowal and repudiation brought home to the knowledge of the beneficiaries. *Ib.* 165.
 11. *Acceptance of trust; when vacancy not created by subsequent disclaimer.*—In this case, the trustee having accepted the trust, his subsequent disclaimer did not create a vacancy in the office, nor authorize the appointment of another trustee; and no loss occurred for two years afterwards. The trustee lived five years after the loss occurred; and the bill was filed, asking the appointment of another trustee, and the recovery of the trust fund, within two years after his death. *Held*, that though the complainants, who had only a life interest, might be barred by *laches* as to the accrued interest, their claim to the interest accruing in future was not barred, and the rights of the remaindermen were not affected by the delay. *Ib.* 165.
 12. *Bill in equity by cestuis que trust against trustee; what relief may be sought in.*—Where property is bequeathed to a trustee, to be taken care of, and the profits and interest to be paid annually to the testator's married daughter, "for the use and support of herself and her children during her natural life, and at her death the whole of said property to go and become the absolute property of her lawful heirs;" the daughter and her children may join in a bill for an account and settlement of the trust, the removal of the trustee, and the appointment of another in his stead. *McDowell v. Brantley*, 173.
 13. *Same; when trustee and his sureties estopped from denying liability to account.*—When a trustee is appointed by the register in chancery, gives bond, and enters on the discharge of his duties of the trust, and a bill in equity is afterwards filed by the beneficiaries, charging waste and loss of the funds, asking an account and settlement, the removal of the trustee, and the appointment of another; he and his sureties are estopped from denying his liability to account, on account of an informality in his appointment. *Ib.* 173.
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24. *Bill of equity by cestuis que trust against trustee; what relief may be sought in.*—Where property is bequeathed to a trustee, to be taken care of, and the profits and interest to be paid annually to the testator's married daughter, "for the use and support of herself and her children during her natural life, and at her death the whole of said property to go and become the absolute property of her lawful heirs;" the daughter and her children may join in a bill for an account and settlement of the trust, the removal of the trustee, and the appointment of another in his stead. *McDowell v. Brantley*, 173.
25. *Same; when trustee and his sureties estopped from denying liability to account.*—When a trustee is appointed by the register in chancery, gives bond, and enters on the discharge of the duties of the trust, and a bill in equity is afterwards filed by the beneficiaries, charging waste and loss of the trust funds, asking an account and settlement, the removal of the trustee, and the appointment of another; he and his sureties are estopped from denying his liability to account, on account of an informality in his appointment. *Ib.* 173.
26. *Vested remainder.*—Where property, real and personal, was conveyed by deed to a trustee, in trust that, during the life of Francis N., he should permit her to have the possession, use and enjoyment, "for the comfort and support of her two minor children, George and Caroline;" and upon her decease, the said lands, and such of the personal property as then remained unimpaired, "shall belong absolutely and in fee to the said George and Caroline, if they shall both then be in being; and if not, then to the survivor of them, and the heirs of the other, if any, or, if none, then to such survivor, quit and discharged of all uses and limitation." George having died before his mother, leaving children, *held* that the remainder to Caroline, as to one-half of the property, vested on his death; and on her subsequent death before her children could not, on the termination of the life estate, recover against her grantee.—*Jolly et als. v. Hobbs et als.* 213.
27. *Resulting trust; what evidence necessary to establish.*—The evidence in this case, seeking to establish a resulting trust in lands by parol evidence, does not come up to the requirements of the rule—the testimony must not only be entirely satisfactory, but clear and undoubted. *Reynolds v. Caldwell*, 232.
28. *Action by trustee, without sanction of court.*—Although trustees, when officers of the Chancery Court, may not have the right to institute an action at law without first obtaining the sanction of the court; yet it may be doubted whether the defendant can interpose this objection in defense of the action, and it certainly can not be raised for the first time in the appellate court. *Smith v. Inge*, 283.

TRUSTS AND TRUSTEES—*Continued.*

29. *Title barred—trustee—cestui que trust.*—When the title of the trustee is barred, so also is that of the *cestui que trust*. *Smith et al. v. Gillam et al.*, 296.

USURY.

1. *Credit on usurious debt by mortgagee.*—When the mortgagee receives mortgaged property from the mortgagor, to be credited at an agreed price on the mortgage debt, a subsequent abatement of the mortgage debt, on bill filed to redeem, on account of usury, will not entitle the mortgagee to a corresponding reduction of the credit allowed. *Knox v. Nall*, 347.

VENDOR AND PURCHASER.

1. *Vendor's lien; proof as to non-payment of purchase-money.*—Where the conveyance recites payment of the purchase-money, and it is not shown that any notes were executed by the purchaser at the time it was delivered, a vendor's lien will not be declared on vague or doubtful testimony; the proof must be sufficient to enable the court satisfactorily to determine, not only the fact that the purchase-money is unpaid, but also its amount; and when uncertainty and conflict as to material facts exist, and the defendant's version of the transaction is sustained by disinterested witnesses, a lien will not be declared. *Jenkins v. Mathews*, 486.

VERDICT.

See PLEADINGS AND PRACTICE.

1. *Court may require jury to correct informal verdict.*—When the jury return an informal verdict, the court may require them to retire again and put it in proper form. *Higginbotham v. Clayton & Webb*, 194.

WARRANTY.

1. *Insurance; warranty and representations distinguished.*—In a contract of insurance, a warranty is part and parcel of the contract itself, is in the nature of a condition precedent, and, whether material to the risk or not, must be strictly complied with, or literally fulfilled, before the assured can recover on the policy; while a representation, not being of the essence of the contract, but relating to something collateral or preliminary, and in the nature of an inducement to it, though false, does not avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by the agreement of the parties. *Ala. Gold Life Ins. Co. v. Johnston*, 467.

WILLS.

1. *Testamentary paper executed on valuable consideration.*—A paper in the form of a will, executed in consideration of personal services rendered or to be rendered, or other valuable consideration, and delivered to the devisee or legatee therein named, may constitute an irrevocable contract. *Bolman v. Overall*, 451.
2. *Same.*—Such a contract is not repugnant to public policy, but may be enforced, after the death of the promisor or testator, by action for a breach against his personal representative, or, in a proper case, by bill in equity against his heirs, devisees, or personal representative. *Ib.* 451.

WILLS—Continued.

3. *Same; how enforced in equity.*—Such testamentary paper, when founded on valuable consideration, is in the nature of a covenant to stand seized to the use of the promisee; and it will be enforced in equity under a bill in the nature of specific performance, by fastening a trust upon the property in the hands of an executor, legatees and devisees, under a subsequent inconsistent will. *Ib.* 451.
4. *Parties to bill.*—All the persons named in such testamentary paper as legatees, their rights differing only in extent or quantity, may unite as plaintiffs in a bill to enforce it. *Ib.* 451.
5. *Probate of subsequent will, as defense to bill.*—The probate of the subsequent will, by the court having exclusive jurisdiction, though binding on the parties claiming under the former testamentary paper, is no defense to a bill which seeks to establish and enforce a trust on the property in their favor. *Ib.* 451.
6. *Will; how attested.*—The attesting witnesses to a will are required to sign it in the presence of the testator (Code, § 2294), but not in the presence of each other. *Moore v. Spier*, 129.
7. *Undue influence; when burden on legatee or devisee to disprove.* Under the rule laid down by this court in former cases (*Waddell v. Lanier*, 62 Ala. 347; *Shipman v. Furniss*, 69 Ala. 565), when the principal devisee and legatee occupied a confidential relation to the testatrix, though related to her by consanguinity more distantly than the contestants, the burden of proof is on him to show that the will was not procured by fraud or undue influence. *Ib.* 129.
8. *Sale of land devised, only revocation pro tanto.*—A sale of the land devised, subsequent to the execution of the will, while it might operate a revocation *pro tanto* of the will, would not invalidate it entirely, nor prevent its probate as to the other property embraced in it. *Ib.* 129.
9. *Evidence as to mental condition of testatrix; when competent.*—Before a witness can be allowed to testify as to the mental condition of the testatrix, it must be first shown that his acquaintance had been so intimate, and had continued for such a length of time, as justified the formation of a correct judgment as to her mental *status* and habits. *Ib.* 129.
10. *Same.*—While the proper inquiry is as to the mental *status* at the time the will was executed, evidence as to its condition at a former time is relevant; and when weakness of mind resulting from senility is urged against the will, it is competent for the proponent to adduce evidence showing that, subsequent to the date of the will, no appearances of imbecility were exhibited. *Ib.* 129.
11. *Same.*—A witness, having knowledge of the facts, may testify that the testatrix was firm in her views and convictions, or, on the other hand, that she was capable of being easily influenced; but not that her character in the community was that of one easily influenced. *Ib.* 129.
12. *Same; construction of will.*—The husband having executed a deed conveying to the remaindermen, in consideration of love and affection, his life-estate in the property, but expressly reserving to himself the power to sell and re-invest as conferred by the will, with power to collect and disburse the rents without liability to account; whatever may be the effect of the provision as to the rents, the power of sale or disposition is unaffected by the conveyance. *Proctor v. Scharpf*, 227.
13. *Infant defendants to the bill; measures for protection of.*—The husband having filed a bill in equity, asking the instructions of the court as to the validity and extent of his powers, and making

WILLS—*Continued.*

the children defendants, the infants thereby become wards of the court, whose duty it is to protect their interests; and the complainant should be required to report to the court, for confirmation, any sale made by him, and may be required, it necessary, to give bond for a faithful re-investment of the proceeds of sale. *Ib.* 227.

14. *Appeal; when dismissed.*—An appeal from a decree rendered on the contested probate of a will, taken within thirty days from its rendition, will not be dismissed on motion, because the citation was not served for several months after the appeal was sued out. *Moore v. Spier*, 129.
15. *Testamentary charge on lands construed, as to extent charged.*—Where the testator, owning an undivided two-thirds interest in fee in a tract of land, by devise from his deceased wife, and an estate *per autre vie* in the other third, by purchase of the dower interest of his mother-in-law, provided that his mother-in-law should have a comfortable support out of his estate, specially charging it on the lands, and describing them as "the lands devised to me by my deceased wife;" devised the lands, subject to said charge, to his wife's sister for life, and then charged "the reversion of said lands" after her death with the payment of \$3,000 to his personal representative, for the benefit of his estate; *held*, that while the charge for the support of the mother-in-law might extend to the testator's entire interest in the land, the charge of \$3,000 was restricted to his undivided two-thirds interest in the fee. *Toney v. Spragins*, 541.

WITNESS.

1. *Impeachment of witness; limitation of inquiry into character.*—In impeaching a witness, the inquiry is not limited to his general character for truth, but may be extended to his character generally. *Motes v. Bates*, 382.

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